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CASE NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JANICE BUTTRUM,

Petitioner,

-vs-

STATE OF GEORGIA,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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## QUESTIONS PRESENTED

I. IS EXPERT WITNESS TESTIMONY WHICH PREDICTS THE LIKELIHOOD OF THE CAPITAL DEFENDANT'S COMMITTING FUTURE ACTS OF VIOLENCE SUFFICIENTLY RELIABLE TO BE ADMISSIBLE AT A CAPITAL SENTENCING PROCEEDING?

II. IF EXPERT WITNESS TESTIMONY AS TO THE LIKELIHOOD OF FUTURE ACTS OF VIOLENCE IS NOT BARRED ALTOGETHER BY THE FEDERAL CONSTITUTION, ARE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS VIOLATED IF:

1. THE EXPERT WITNESS HAS NOT EXAMINED THE DEFENDANT;

2. BASES HIS CONCLUSION LARGELY ON HEARSAY AND FACTS NOT IN EVIDENCE BEFORE THE SENTENCING JURY;

3. THE INDIGENT DEFENDANT IS REPEATEDLY DENIED REQUESTS FOR AN INDEPENDENT PSYCHIATRIC EXAMINATION AT STATE EXPENSE; AND

4. THE EXPERT IS THE ONLY WITNESS CALLED BY THE PROSECUTION TO ESTABLISH AGGRAVATING CIRCUMSTANCES AT THE SENTENCING PROCEEDING?

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## OPINIONS BELOW

The decision of the Supreme Court of Georgia, affirming the conviction and sentence of Petitioner, is not yet reported, but is reproduced in the Appendix of this Petition at pages A-1 through A-16.

The decision of the Supreme Court of Georgia is not reported; trial proceedings are reproduced in the Appendix at pages A-22 through A-60.

## JURISDICTION

Petitioner respectfully requests this Court to invoke jurisdiction under 28 U.S.C. § 1257(3). The Superior Court of Whitfield County convicted Petitioner of murder and theft by taking on August 30, 1981. On the next day, Petitioner was sentenced to die in the electric chair. Both the convictions and sentences were affirmed by the Supreme Court of Georgia. On August 26, 1982, Justice Powell extended the time in which to file a Petition for a Writ of Certiorari until October 6, 1982. Petitioner prays that this Court grant the Writ of Certiorari for the reason that the state courts in the instant case have incorrectly decided important federal questions that should be settled by this Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution*

Amendment VI

Amendment VIII

Amendment XIV

*Full Text of Amendments Are Reproduced in the Appendix at A-61.

Georgia Code**

Chapter 38-3 (Hearsay)

Selected Provisions

**Full Text of Selected Provisions Are Reproduced in the Appendix to this Petition, at pages A-62 to A-64.

## STATEMENT OF THE CASE

In the early morning hours of September 3, 1980, Demetra Faye Parker was murdered near Dalton, Georgia. On September 4, 1980, seventeen year old Petitioner Janice Buttrum and her husband, Danny Buttrum, were arrested in Pensacola, Florida and transported to Dalton. The two were indicted by a grand jury on October 13, 1980 on the capital charge of the murder of Demetra Parker, as well as theft of her automobile.

On October 23, 1980, defense counsel filed a Special Plea of Incompetency to Stand Trial, and a trial on this issue was held on the 4th, 5th, and 6th of February, 1981. The Jury found her competent to stand trial. At the time the Special Plea was made, defense counsel also made motions for a state- funded, private psychiatrist and other witnesses to participate in the defense's preparation for trial (A-51). The Superior Court of Whitfield County overruled these motions (A-51). The Motion for a private psychiatric examination and testing was re-urged on February 24, 1981, and denied the following day (A-52).

On August 13, 1981, the date set for the final motions in the case (A-55), the District Attorney disclosed that a psychologist, Dr. Henry Adams, had reviewed the case, and formed an opinion and clinical impression of Janice Buttrum (A-56). A copy of Dr. Adams' report was provided to defense counsel at that time (A-56).

In response to this disclosure, defense counsel, at a hearing on August 19, 1981, again moved for a state-funded private psychiatrist to assist in Janice Buttrum's defense--specifically in regard to Dr. Adams' opinion and expected testimony. Defense counsel stated:

> "We don't have access to a person like Dr. Adams, and we feel in fundamental fairness, the dictates of the Fourteenth Amendment, Sixth Amendment, and Fourth Amendment of the State and Federal Constitutions demand that we be treated fairly and that we have an adequate opportunity to countermand this sort of very significant evidence . . . when the District Attorney senses the need to go out and secure private psychiatric assistance in the prosecution, we sense the need; and these motions are simply in response to that--" (A-57.)

The trial court denied the motion (A-57). Counsel then requested a continuance of a few days in order "to prepare to deal with this sort of adverse evidence," (Adams' anticipated testimony). (A-59.) The trial court denied the motion for continuance, concluding that the five days remaining before trial provided ample time to confer with the State psychologists and psychiatrists who had earlier evaluated Janice Buttrum and found her competent to stand trial. (A. 60.)

The Guilt-Innocence phase of Janice Buttrum's bifurcated trial began on August 24, 1981. On August 30, 1981, she was found guilty of murder and theft by taking.

The sentencing phase commenced immediately thereafter, and continued to the next day, when the jury sentenced her to death by electrocution. During the sentencing proceedings, the sole witness presented by the prosecution for the purpose of establishing aggravated circumstances was psychologist Henry Adams. He informed the jury that eighteen year old (A-39) Janice Buttrum was "an anti-social personality, and a case of paraphilia sexual sadism." (A-30.) He explained that, "when [this] disorder really becomes severe the [individual] may torture, kill, mutilate their victims. It is a repetitive kind of activity that continues until the individual is apprehended, or stopped in some way or another." (A-22.) When asked if he had an opinion as to

the potential for other acts, Adams testified that, "Part of the definition of sexual sadism is repetitive acts; . . . you would expect it to continue." (A-31.)

A personal examination of Ms. Buttrum was never made by Henry Adams, however, nor was any attempt made to do so. (A-32, 33.) The conclusions reached by Henry Adams were claimed to be based on a non-specified package of psychiatric reports, Janice Buttrum's confessions, F.B.I. Reports, the autopsy report and photographs of the victim, and interviews with certain unidentified jailers. (A-25, A-26.)

With the exception of some photographs, none of this material was placed in evidence at the sentencing phase. (A-25, A-26, A-38.) Some aspects of the confessions, F.B.I. Reports, autopsy report, and photographs had been placed before the Jury in the guilt phase but were not re-introduced. Further, the psychiatric reports and interviews with unidentified jailers purportedly relied upon were not placed in evidence at the guilt or sentencing phases.

Counsel objected strenuously and continuously to the course of testimony of Henry Adams:

> "We would raise the objection that, one it's based upon hearsay, two; it's based upon conclusions made by others--opinions of others, people not under his control or authority; that it contains--based upon facts not evidence, facts not supported by the evidence that the testimony is irrelevant and calculated to inflame and prejudice the jury; and that it is an improper area for expert opinion . . . , and Your Honor, we feel that all of this is improper, and to allow this gentleman to go on would be to deny Janice Buttrum her rights to due process and to a fair trial, as stated in the Fifth, Sixth, Eighth, and Fourteenth Amendments." (A-27, A-28, A-29.)

Counsel further objected that any:

> "speculation or predict[ion] [as to] criminal behavior . . . is totally improper, on the same constitutional grounds that we urged before." (A-31.)

The trial judge overruled all objections to this testimony (A-28, A-31). Defense counsel cross-examined Henry Adams, then proceeded to present lay witnesses in mitigation, testifying to her very "deprived upbringing." (A-8.)

In closing argument, the District Attorney invited the sentencing jury to consider this "deviant pervert, a murderer, a butcher," (A-41), as one who "potentially could do it again," (A-42), adding, "Who will be next? You? Your wife? Your daughter?" (A-42), and finally, "God save us all from Janice Buttrum . . . may Janice Buttrum never again haunt society." (A-43.)

The trial judge proceeded to inform the jury of the aggravating circumstances: murder in the commission of aiding and abetting rape; murder which was outrageously and wantonly vile, horrible or inhuman, in that it involved either torture to the victim; or depravity of mind of the Defendant; or an aggravated battery to the victim (A-44, A-45, A-46, A-47, A-48). The jury found all aggravating circumstances existed and imposed the death penalty. (A-50.)

Janice Buttrum argued on appeal to the Georgia Supreme Court that the trial court erred in admission of Henry Adams' testimony, as it was based upon hearsay and facts not in evidence, that it was "inappropriate to speculate about the (Petitioner's) future behavior," and "patently unfair" to allow this information to be considered in determining if the aggravating circumstance of "depravity of mind" was present. [Brief of Appellant, Assignment of Error No. 1, (A-12, A-13, A-14)]. Further, Petitioner Buttrum contended that the use of this expert testimony collectively with other actions by the judge and prosecutor resulted in an "arbitrary and capricious" sentencing decision "infected by emotionalism, passion, and prejudice," in violation of the Eighth and Fourteenth Amendments. [*Id.*, Assignment of Error No. 2. (A-15, A-16, A-17).]

The Georgia Supreme Court affirmed Janice Buttrum's conviction and death sentence on July 8, 1982. The Court concluded that the expert witness' testimony was admissible:

> "The fact that an expert's opinion may be based in part on facts not in evidence goes to the weight and credibility, not to its admissibility. *Redfield v. State*, 240 Ga. 460(1), 241 S.E. 2d 217 (1978) and cases cited." (A-7.)

The Court's sentence review concluded:

> "The sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor." (A-8.)

In respect to the denial of a private psychiatric examination at state expense to respond to Henry Adams' testimony, counsel for Janice Buttrum addressed this in Enumeration of Error No. 8, contending:

> "The trial court's failure to appoint expert assistance for the Appellant not only denied her due process of law, but denied her her Sixth Amendment right to effective assistance of counsel as well." (A-18.) [and that], "The Court erred in denying the Appellant expert assistance equivalent to that provided by the State." (A-19.)

The Georgia Supreme Court concluded that there had been "no abuse of discretion in denying the motion for funds for expert witnesses." (A-5.) The Court relied on a statement of defense counsel to conclude there was "no critical evidence subject to varying opinion." (A-5.)

However, the statement the Georgia Supreme Court relied upon was made at the February 1981 hearing, and related to a request for a forensic criminologist. This was unrelated and irrelevant to the other issue briefed by the Appellant in the Georgia Supreme Court, in the latter portion of Enumeration of

Error No. 8, (ending at A-19). This issue, the trial court's denial on August 19, 1981 of an independent psychiatric examination to countermand the expected testimony of Henry Adams therefore was not accurately addressed by the Georgia Supreme Court. A Motion for Extension of Time in which to file a Petition for Certiorari was granted by Justice Powell on August 26, 1982, and the case is now before this Court.

## ARGUMENT

### I. THE EIGHTH AND FOURTEENTH AMENDMENTS BAR THE ADMISSION OF EXPERT WITNESS TESTIMONY REGARDING THE LIKELIHOOD OF THE CAPITAL DEFENDANT'S COMMISSION OF FUTURE ACTS OF VIOLENCE, AS SUCH PREDICTIONS ARE NOT SUFFICIENTLY RELIABLE TO BE CONSIDERED BY THE CAPITAL SENTENCING JURY, AND IF CONSIDERED, MAY YIELD ARBITRARY AND CAPRICIOUS SENTENCES OF DEATH.

The only witness called by the State of Georgia at Janice Buttrum's sentencing proceeding for the purpose of establishing aggravating circumstances was Henry Adams, a psychologist. Adams testified that he believed Janice Buttrum had an anti-social personality, was a case of paraphilia sexual sadism (A-30), and that he would expect her to continue to commit similar acts of sexual assault and homicide in the future. (A-31.)

Counsel for Mrs. Buttrum entered a continuing objection to this testimony:

> ". . . the testimony is irrelevant and calculated to inflame and prejudice the jury; and that it's an improper area for expert opinion . . . that to allow this gentleman to go on would be to deny Janice Buttrum her rights to due process and to a fair trial, as stated in the Fifth, Sixth, Eighth, and Fourteenth Amendments." (A-27, A-28.)

Motions for mistrial were made at the close of direct examination (A-30), cross examination (A-37), and at the close of

the evidence (A-40). All objections and mistrial motions were overruled.

This Court has recognized that the Eighth and Fourteenth Amendments demand a greater "reliability in the determination that death is the appropriate punishment," (*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

The evidence presented in aggravation at a capital sentencing proceeding should thus possess "a greater degree of reliability," so as not to "create the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Even if one assumes that the risk posed to the safety of others by a convicted capital defendant is relevant in the capital sentencing proceeding, *c.f. People v. Murtishaw*, 29 Cal. 3d 733, 175 Cal. Rptr. 738, 631 P. 2d 446, 469-470 (1981), *cert. denied* ___ U.S. ___, 50 U.S.L.W. 3591 (1982), expert witness testimony as to future dangerousness is a constitutionally insufficient method of assessing this possibly relevant factor.

This Court has recognized that, "Given the lack of certainty and fallibility of psychiatric diagnosis," there is a "serious question" as to whether psychiatric diagnosis can ever establish a defendant's future dangerousness beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 429 (1979). The Court's statement as to the very questionable reliability of these expert predictions is strongly supported by those very persons expected to make them. The American Psychiatric Association's *Task Force Report on Clinical Aspects of the Violent Individual*, at 23, described such testimony as "fundamentally of very low reliability." (Emphasis added.)

A Task Force of the American Psychological Association similarly concluded that:

> ". . . the validity of psychological predictions of violent behavior, at least in the sentencing and release situations . . . is extremely poor." *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 *Am. Psychologist* 1099, 1110 (1976). (Emphasis added.)

In the 1979 Term of this Court, the American Psychiatric Association, in an extensive *Amicus Curiae* Brief to *Estelle v. Smith*, 451 U.S. 454 (1981), requested that:

> "In the unique circumstances of a capital case, this Court should prohibit the use of such testimony altogether, and thereby bar false claims to expertise that inevitably distort the jury's fact-finding process." Brief *Amicus Curiae* of the American Psychiatric Association at 10, *Estelle v. Smith*, 451 U.S. 454 (1981).

In *Estelle*, this Court concluded that excluding expert testimony as to future dangerousness on grounds of violation of the Fifth, Sixth, and Fourteenth Amendments, would not prevent the State of Texas from proving the defendant's future dangerousness as required by their statute, as the "issue is in no sense confined to the province of psychiatric experts." *Id.*, at 472.

Given the availability of lay witness testimony; the almost universally acknowledged unreliability of expert predictions of future dangerousness, Brief *Amicus Curiae*, *supra*, at 11-14; Dix, "Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations," 19 *Amer. Crim. L. Rev.* 1, 16-21 (1981); and that such "psychiatric testimony is especially susceptible to uncritical acceptance by sentencing juries," Dix, *supra*, at 43, n. 215, such testimony should be excluded from capital sentencing proceedings. Expert witness testimony as to the likelihood of future dangerousness simply "introduces a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 643 (1980).

This issue is ripe for decision. Expert testimony as to future dangerousness is still rather widely permitted in capital prosecutions and across the country, see Dix, *supra*, at 4-6. One court has already ruled such testimony is generally inadmissible due to its unreliability, *People v. Murtishaw*, *supra*, 631 P. 2d, at 470. See Note, "*People v. Murtishaw:* Applying the *Frye* Test to Psychiatric Predictions of Dangerousness in Capital Cases," 70 *Calif. Law R.* 1069, 1077-1084 (1982). The professional associations affected have given their opinion of this form of testimony and one, as noted, has already requested this Court rule in accordance with Petitioner Buttrum's argument.

II. THE ADMISSION OF AN EXPERT WITNESS OPINION THAT JANICE BUTTRUM WOULD ENGAGE IN FUTURE ACTS OF VIOLENCE DENIED HER A FAIR AND RELIABLE DETERMINATION THAT DEATH IS HER APPROPRIATE PUNISHMENT AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS, CONSIDERING THE TOTALITY OF CIRCUMSTANCES:

1. EXPERT WITNESS TESTIMONY OF THIS TYPE IS GENERALLY OF VERY LOW RELIABILITY;
2. THE EXPERT WITNESS NEVER PERSONALLY EXAMINED OR INTERVIEWED JANICE BUTTRUM;
3. THE EXPERT WITNESS BASED HIS CONCLUSION ON HEARSAY AND MATERIALS NOT IN EVIDENCE BEFORE THE JURY;
4. THE TRIAL COURT REPEATEDLY REFUSED THE INDIGENT JANICE BUTTRUM'S REQUESTS FOR AN INDEPENDENT PSYCHIATRIC EXAMINATION AT STATE EXPENSE; AND
5. THE EXPERT WITNESS WAS THE ONLY WITNESS CALLED BY THE PROSECUTION TO ESTABLISH AGGRAVATING CIRCUMSTANCES AT THE SENTENCING PROCEEDING.

"Fundamental principles of procedural fairness apply at the penalty phase of a trial in a capital case," *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (*per curiam*). As earlier noted, the Eighth and Fourteenth Amendments also require "a greater degree of reliability when the sentence of death is imposed." *Lockett*, *supra*, at 604.

Under the totality of the circumstances herein, Janice Buttrum was denied her right to a fair and reliable determination that death is her appropriate punishment.

1. Expert Witness Opinion Testimony of This Type is Generally of Very Low Reliability

As more fully discussed in the Argument for the First Question Presented, expert witness prediction testimony is generally acknowledged to be of low accuracy. Experts "too often predict dangerousness, especially in the case of the mentally ill offender," and exhibit a "tendency toward false positive errors in prediction." Brief *Amicus Curiae*, American Psychiatric Association, *supra* at 15, n. 8.

If this be true of such testimony generally, in Janice Buttrum's case the odds that an accurate and reliable prediction of future dangerousness was presented to the sentencing jury are practically nil.

2. The Expert Witness Never Personally Examined or Interviewed Janice Buttrum

The trial court qualified Henry Adams as an expert and allowed him to give his own frightening predictions of eighteen year-old Janice Buttrum's future without Adams ever having seen her, observed the course of the trial, or been advised of the facts before the jury (A-32, A-33). He had not attempted to examine her (A-32, A-33), nor were any examinations administered by another under Adams' supervision or control.

The extensiveness of an examination as to future dangerousness clearly reflects on the likely reliability of any

conclusions therefrom, see *People v. Murtishaw, supra,* 631 F. 2d, at 470; and *Holloway v. Texas*, 613 S.W. 2d 497, 502-3 (1981). Here, no examination was made by this witness, and yet he was permitted to make a claim of expertise and testify on this very likely damning issue. The "leading texts on forensic psychiatry take for granted that the clinician will interview the subject before testifying about [her]." Bonnie & Slobogin, "The Role of Mental Health Professionals in the Criminal Process," 66 *Va. L. Rev.* 427, 496, n. 204 (1980). When no personal examination is made, the testimony is "of doubtful worth and often of dubious ethical quality." Diamond & Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations," 63 *Mich. L. Rev.* 1335, 1347 (1965), as California, Texas, and even Henry Adams himself recognize.[1/] While gross psychopathology may occasionally be based on observation of the defendant in the courtroom, Henry Adams made no such observation, and went beyond an evaluation of gross psychopathology. Additionally, the issue was not framed as a hypothetical question, and cannot be sustained under this approach.

3. The Expert Witness Based His Conclusion on Hearsay and Materials Not in Evidence Before the Jury.

In *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978), this Court declared that one accused of a crime is entitled to have

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[1/] Adams himself admitted, in cross-examination:

> "Granted, if you actually examine the patient, you would feel much more comfortable about the accuracy of your opinion. (A-33.)

He further stated in his letter to the District Attorney:

> ". . . the conclusions I have reached in this case should be viewed with caution since I have not examined the patient." (A-36.)

his guilt or innocence determined "solely on the basis of the evidence introduced at trial" and that due process may well be violated if "circumstances not adduced as proof at trial" are considered by the fact-finder. Adams' testimony created a genuine danger that the jury would sentence Defendant to death on the basis of facts not in evidence before them. The great majority of the materials which Henry Adams relied upon in forming his opinion were not admitted into evidence at the sentencing proceeding. The hospital and psychiatric reports and interviews with unidentified jailers were not placed in evidence at the guilt or sentencing phases. (A-25, A-26, A-38.)

Allowing opinion testimony under such circumstances in a capital case is patently unfair, as it substantially forecloses any opportunity for the jury to assess the reliability of the predictions made. Even if these jurors were in fact willing to inquire into the appropriateness of the prediction, and to somehow "sift the mystique from the facts," Brief, *Amicus Curiae*, American Psychiatric Association, *supra* at 17, they were at a substantial disadvantage as there was insufficient introduction and description of the facts relied upon.

Testimony as to future dangerousness has been barred under similar circumstances, *Holloway v. Texas*, *supra*, on traditional evidentiary principles,[2/] and a similar result should be reached under the Eighth and Fourteenth Amendments.

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[2/] Although Fed. R. Evi. 703 may admit this form of testimony, one can question whether the cases preceding it, and upon which the rule was supposedly based, would support this view. See *Jenkins v. United States*, 307 F. 2d 637, 642 (D.C. Cir., 1962) (expert opinion did not rely solely on reports not then in evidence but also on his own earlier examination). Further, the facts or data relied on must be of a type reasonably relied upon by experts in the particular field. One may question whether this form of testimony meets the general acceptance in the scientific community test of *Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923), see Dix, *supra* at 8-22, and whether such predictions are reasonably made when relying upon these forms of materials,

The Sixth Amendment right to confrontation is also implicated by this practice. Much, if not all, of the material relied upon was and/or contained hearsay. Some, admitted in the guilt phase, apparently fit into an exception to the Georgia hearsay rules. It is difficult to assess if the other materials would have been admissible under Georgia's hearsay exception or other provisions, see Ga. Code Ann. §§ 38-301, 38-302, 38-305, 38-306, 38-310, 38-409, 38-411, 38-414, and 38-418 (A-62, A-63), as the nature and contents of the materials were not particularized. One similarly cannot assess whether "substantial reasons existed to assume [the hearsay's] reliability," *Green v. Georgia*, 442 U.S. 95, 97 (1979). The prosecution did not proffer, and was not required by the Court to proffer, these materials. It would appear that as there was no opportunity to cross-examine whatever declarants were involved, a violation of the Sixth Amendment right arose. *California v. Green*, 399 U.S. 149 (1970).

If a substantial constitutional question potentially arises from an appellate court's reliance upon extra-record material to affirm the death sentence, see *Brown v. Wainwright*, ___ U.S. ___, 102 S. Ct. 542, 70 L. Ed. 2d 407 (1981) (dissent from denial of certiorari of Justices Marshall and Brennan), and *Ford v. Strickland*, 676 F. 2d 434, 450-456 (11th Cir., 1982), *reh. granted en banc*, then certainly a sentencing jury's reliance

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2/ (Continued)

and without any personal observation by the expert. See McElhaney, "Expert Witnesses and The Federal Rules of Evidence," 28 *Mercer L. Rev.* 463, 483-487, and n. 93 (1977). Further, Fed. R. 403 may preclude such evidence due to its potential for prejudice.

Georgia had traditionally required that testimony be based on facts then in evidence, see *Stancill v. McKenzie Tank Lines*, 497 F. 2d 529, 536 (5th Cir., 1974), but recently altered that position.

upon an expert's opinion drawn from extra-record material is deserving of this Court's review.[3/]

Petitioner Buttrum believes the Georgia Supreme Court's characterization of Henry Adams' opinion as proper under Georgia law because it was only "based in part on facts not in the record," *Buttrum v. State* at 7, seriously understates the relative amount of extra-record evidence considered--some of the photographs may have been in evidence before the sentencing jury, the remainder was not. In any event, a state procedural or evidentiary rule which "diminishes the reliability of the sentencing determination" must be invalidated by this Court to insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion." *Beck v. Alabama*, *supra*, at 637-638.

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[3/] In the dissent from denial of certiorari, *Brown v. Wainwright*, 2d, 408, Justice Marshall expressed concern that the consideration of material not presented at trial and not a part of the trial record or record on appeal was:

> "inconsistent with this Court's past insistence on strict procedural regularity in the imposition and review of capital sentences. See *Gardner v. Florida*, 430 U.S. 349 . . . (1977), [as] much of the information appears to be inadmissible and unreliable hearsay." *Id.*

Justice Marshall feared that the information "untested by the adversary process" would "distort the State Supreme Court's appellate functions" of review of the propriety of a death sentence. *Id.*

Similarly, here information is being relied upon by an expert to form an opinion that may very well be dispositive to the jury considering whether to impose the death penalty. Although the expert here was subject to cross examination, counsel was at a substantial disadvantage in attempting to impeach his opinion as much of the basis for it was not clearly identified or explained.

4. The Trial Court Repeatedly Refused the Indigent Janice Buttrum's Requests for an Independent Psychiatric Examination.

Under the circumstances of this case, the rejection of Janice Buttrum's repeated requests for an independent psychiatric examination at state expense denied her a "fair and adequate opportunity" to defend against the expert witness prediction testimony, as required by the Fourteenth Amendment due process, *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973) and equal protection clauses, *Ross v. Moffit*, 417 U.S. 600, 616 (1974), and the Sixth Amendment right to effective assistance of counsel, *Powell v. Alabama*, 287 U.S. 45, 71 (1932). Any of these three provisions may be denied when the court refuses to expend state funds and the expert services requested are necessary to the preparation and presentation of an adequate defense. *Williams v. Martin*, 618 F. 2d 1021 (4th Cir., 1980).

The standard for determining whether expert assistance is constitutionally required by the equal protection or right to counsel clauses is:

> "Whether a substantial question requiring expert testimony arose . . . . and whether [Petitioner Buttrum's] defense could be fully developed without professional assistance." *Id.*, at 1026.

In *Little v. Streater*, 452 U.S. 1, 6 (1981), this Court required analysis of three factors in determining whether the defendant is deprived of his due process right to "a meaningful opportunity to be heard:"

> "the private interests at stake, the risk that the procedures [otherwise] used will lead to erroneous results and the probable value of the suggested procedural safeguard, and the governmental interests affected."

When these analyses are applied in the instant case, the deprivation of rights is plain. Here, the interests of Janice Buttrum are the greatest the law and nature recognize--life itself. The prosecution, by its own action in presenting Adams as their sole witness at sentencing, has made expert analysis of eighteen year old Janice Buttrum's future dangerousness a critical, if not dispositive, factor for the jury's decision whether she should live or die.

Further, as noted earlier, very substantial questions are raised as to whether experts can give reliable predictions as to future dangerousness, let alone under the methods engaged in by Adams. A clear likelihood existed that Adams' prediction was erroneous.

One can question the value of the procedural safeguard requested by counsel, that of an independent psychiatric examination, since as Janice Buttrum has earlier argued, any prediction made is likely to be unreliable, and should be therefore inadmissible in capital sentencing proceedings. However, if such a prediction is to be admitted, as it was in this case, a capital defendant is entitled to a fair opportunity to rebut the diagnosis and prediction made. That fair opportunity requires a resort to the same type of evidence, expert testimony, but, hopefully of a more reliable type, that based on a personal examination engaged in for this purpose.

Rejection of this assistance served no substantial governmental interest. The Georgia Supreme Court's conclusion that "the Petitioner made no contention that any critical evidence was subject to varying opinion," (A-5) is totally inaccurate in respect to the request for this assistance. The Georgia Supreme Court relied upon a response given by defense counsel at a hearing on February 24, 1981, six months before trial. Even

the Prosecution admitted in its appellate brief that this response related to the request for an independent forensic criminologist. (A-20, A-21.) The request for funds for an independent psychiatrist at issue here was made when defense counsel received, just ten days prior to trial, the report which Adams had provided the prosecution. At a hearing on August 19, 1981 (A-53, A-54, A-55), defense counsel strongly argued that:

> "The conclusions which he (Adams) reaches are vastly different and in excess of the conclusions reached by the team at Milledgeville--the state psychologists and psychiatrist. We're very concerned about the potential impact of testimony of the nature which we would anticipate . . . We don't have access to a person [private, non-state system psychologist or psychiatrist] like Dr. Adams, and we feel like in fundamental fairness, the dictates of the Fourteenth Amendment . . . demand that we be treated fairly and that we have an adequate opportunity to countermand this sort of very significant evidence." (A-56, A-57.) (Emphasis added.)

Clearly, this was critical evidence and it already appeared capable of being subject to some varying opinion.[4/] By the Georgia Supreme Court's own standard of abuse of discretionary review, then, it appears Janice Buttrum should have been given an independent psychiatric examination. Yet, she was not, and her life is at this time forfeited.

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[4/] Further, it is not constitutionally:

> "incumbent upon [Janice Buttrum] to prove . . . that an independent expert would have provided helpful testimony at trial. An indigent prisoner 'should not be required to present proof of what an expert would say when he is denied access to an expert.'" *Williams, supra* at 1026-1027.

The fact that defense counsel had an opportunity to cross-examine Adams does not suffice; a fair opportunity to rebut this testimony required an independent psychiatric examination. Firstly, the jury was still permitted to rely upon what purported to be an expert opinion, and had no witness of similar or equal qualifications before them with which to compare his opinion. Although reference was made in cross that the State, when examining Janice Buttrum's competency to stand trial, had reached a conclusion of "no mental disorder," (A-36), there was ambiguity as to whether there was actually "no medical diagnosis" made (A-34), as displayed by Adams' testimony, "I went through all of their information, and simply because they did not decide that there was no medical diagnosis . . . I don't have to come to their same conclusion . . ." (A-34, A-35.) The ability to cross-examine was thus insufficient to overcome the very substantial disadvantage at which Petitioner Buttrum was placed without an independent psychiatric examination to assess the likelihood of future criminal acts.

Adams' reliance on these competency evaluation reports to form an opinion as to future dangerousness is itself particularly dubious. A prediction of future dangerousness requires substantially expanded clinical predicates, Kozol, et al., "The Diagnosis and Treatment of Dangerousness," 18 *Crime and Delinquency* 371, 380-384 (1972); Mergergee, "The Prediction of Dangerous Behavior" 3 *Crim. Jus. & Behavior* 1, 8-9 (1976), and, as the experts and courts have recognized, varies considerably from the clinical predicates for a competency evaluation. *Amicus* Brief, *supra* at 20, n. 11; *United States v. Taylor*, 437 F. 2d 371 (4th Cir., 1971); *United States v. Alvarez*, 519 F. 2d 1036 (3rd Cir., 1975); *United States v. Fortune*, 513 F. 2d 883 (5th Cir., 1974); *United States v. Walker*, 537 F. 2d 1192 (4th Cir., 1976). "Under no circumstances should an examination focused on competency to stand trial, or even on the defendant's mental

state at the time of the offense, be used as a basis for formulation of an opinion on dangerousness," Bonnie, "Foreword: Psychiatry and the Death Penalty: Emerging Problems in Virginia," 66 *Va. L. Rev.* 167, 177 (1980), yet this is the primary clinical data that Henry Adams relied upon.

This very significant distinction between competency evaluations and evaluations for future dangerousness is even more troubling because the trial court's apparent reason for denying an independent psychiatric examination was that the state psychologists and psychiatrists at Milledgeville could be presented on Janice Buttrum's behalf to counter the anticipated testimony of Henry Adams. (A-53.) As these evaluations were simply for competency purposes, and there was ambiguity even as to whether any medical diagnosis had been made, these experts could provide no viable expert witness testimony as to future dangerousness.

Janice Buttrum required what she repeatedly requested, an independent psychiatric examination, if she was to attempt to refute Henry Adam's medical diagnosis and prognosis for her future. Janice Buttrum doesn't have to prove that with a further psychiatric examination there would have been, see fn. 4, *infra*, a different medical diagnosis, but that possibility is clear. Even if examination yielded the same medical diagnosis, some question may have been raised as to whether such an individual could be treated, or eventually rehabilitated. As noted in the *Amicus* Brief of the American Psychiatric Association, at 20, n. 11, "Some techniques may be effective in the treatment of anti-social personality in juvenile offenders . . ." Paraphiliac sexual sadists may have some capabilities for treatment, also. Schmidt, "Biochemical Methods in the Treatment of Sexual Disorders," Vol. 3, No. 1 *Psychiatric Clinics of North America* 189, 195-196 (April, 1980). With expert testimony on her behalf,

Janice Buttrum may have been able to challenge the picture of never-ending sexual violence so carelessly painted by Henry Adams. To add a further nail to the coffin, after the trial court denied counsel's request for a psychiatric examination at the August 19th hearing, (A-53, A-54), the defense then requested a continuance to respond to Adams' proposed testimony, if not by an independent examination, then by:

> "either a trip to Milledgeville or to sit down with Dr. Bullard to prepare to deal with this sort of adverse testimony; and we feel like we were pushing very closely with the time of the trial and that this disclosure [Adams' Report] comes very late." (A-59.)

This too was denied. The trial court apparently believed that the five days left prior to trial was adequate since initial overtures to these persons had been made. Of course, much remained to be done in that time period, and there was no recess between the guilt and sentencing phases in which to engage in the extensive preparation for this testimony. This further diminished the capability of counsel to "cure" the error in denying a psychiatric examination by the cross-examination of the state's witness.

Taken singly, the failure to provide an independent psychiatric examination to capital defendants when evidence of future dangerousness is presented by the State violates the Sixth and Fourteenth Amendments. When combined with the other issues presented herein, it is clear that Janice Buttrum did not receive a fair and reliable determination of sentence.

5. The Expert Witness was the Only Witness Called by the Prosecution at the Sentencing Proceeding.

The prejudice to Petitioner Buttrum is quite obvious. Henry Adams was the only witness called by the prosecution at the sentencing proceeding. He testified that Janice Buttrum was,

"an anti-social personality and a case of paraphilia sexual sadism," of "polymorphous sexual perversion," (emphasis added), who would be "expect(ed) to continue" to engage in "almost any activity that will turn [her] on of a sexual nature, varying from heterosexual or homosexual to whatever." (Emphasis added.) (A-29, A-30.) Adams further testified that sexual sadists:

> "induce their sexual pleasure" "by the pain of the victim," [and that] "When the disorder really becomes severe, they may torture, kill, mutilate their victims. It is a repetitive kind of activity that continues until the individual is apprehended, or stopped in some way or another . . . It is a biological drive with biological rhythm." (A-22, A-23, A-24.) (Emphasis added.)

His testimony paralleled the definition of the aggravating circumstances. The trial court instructed the jury that it may only impose the death sentence if it found one or more of the aggravating circumstances beyond a reasonable doubt. (A-48.) The court charged on four aggravating circumstances. As to the first, murder committed while the Defendant was engaged in the commission of rape, the Court instructed: ". . . you would have to find that this Defendant aided and abetted a male individual" (A-46) "to rape the victim." For the second, the court instructed that "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim." (A-47.) For the third, that "it involved depravity of mind of the Defendant," and that "the word depraved has also been defined as 'marked by corruption or evil, or especially perverted.'" (A-47, A-48.) The fourth, that of aggravated battery to the victim, was described as "maliciously causing bodily harm to another . . . by seriously disfiguring a body or a member thereof." (A-48.)

The relationship between the testimony offered and the aggravating circumstances is obvious. This was the only witness the prosecution called at the sentencing proceeding to establish aggravating circumstances. The jury was free to and apparently did rely on it in reaching their conclusion that Janice Buttrum was guilty of each of these aggravating circumstances.[5/]

Although evidence was presented as to relevant mitigating circumstances, particularly Janice Buttrum's youthful age, and her deprived upbringing, the expert prediction of future sexually sadistic violence, of apparent incurability of her condition, may have deprived her of hope for life imprisonment.

The prosecutor's closing argument exhorted the sentencing jury to consider this "deviant pervert, a murderer, a butcher (A-41), as one who "potentially could do it again." (A-42.) He impressed on the jury the fear that this youthful offender will kill again: "Who will be next? You? Your wife? Your daughter?" (A-42), and finally, "God save us all from Janice Buttrum . . . May Janice Buttrum never again haunt society." (A-43.)

The prediction of future dangerousness herein clearly "implant[ed] in the mind of each juror the message that the death penalty . . . is the only way to protect society from the defendant," *Hurtishaw, supra*, 631 P. 2d at 470, even though some mitigating factors were present. Thus, substantial likelihood exists that this fear of future dangerousness so infected the jury determination as to result in a sentence based on emotion or caprice rather than reason. *Beck, supra*, at 638.

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[5/] A constitutional issue arises if the jury improperly concluded that one of several aggravating circumstances was proven. *See Zant v. Stephens*, ___ U.S. ___, 102 S. Ct. 1856 (1982). Although the photographs of the victim placed in evidence at the sentencing hearing may possibly help to support a finding of torture or aggravated battery, the prosecution presented no other witnesses at the sentencing hearing to testify to depravity of mind or rape of the victim.

## CONCLUSION

For the State to forfeit a human life on the basis of unreliable evidence is shocking. To be unable to effectively rebut that evidence because of one's poverty is patently offensive to any sense of fair play.

Yet, "expert" predictions as to future dangerousness are being made in many sentencing hearings in this country. In some, the fate of indigent capital defendants like Janice Buttrum are being sealed, while they are deprived of expert assistance with which they could at least dispute the forecast made.

This Court has already gone to some extraordinary measures to ensure that the capital defendant is afforded process that will guarantee, as much as is humanly possible, that the sentence is not imposed out of whim, passion, prejudice or mistake. An *Amicus* Brief has already been presented to this Court attesting to the substantial likelihood of mistakes in expert witness predictions of future dangerousness, an *Amicus* Brief prepared by those very persons expected to make these predictions. Their doubts, and fears of capricious impositions of the ultimate penalty, are as well-founded today as they were then.

Yet, if this Court should be willing to permit expert witness prediction testimony, it must recognize and act now upon its constitutional responsibility to assure that indigent capital defendants across this country have an adequate opportunity to contest this expert testimony.

For the reasons presented in the foregoing argument, Janice Buttrum respectfully requests that this Court grant her Petition for Writ of Certiorari to the Georgia Supreme Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari was sent by ordinary mail to Mr. Michael J. Bowers, Attorney General, Judicial Building, Room 132, Atlanta, Georgia 30334, and Mr. Stephen A. Williams, District Attorney, Conasauga Judicial Circuit, Whitfield County Courthouse, Dalton, Georgia, 30720, Counsel for the Respondent, on this 6th day of October, 1982.

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CASE NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JANICE BUTTRUM,

Petitioner,

-vs-

STATE OF GEORGIA,

Respondent.

APPENDIX TO THE PETITION FOR
WRIT OF CERTIORARI

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In the Supreme Court of Georgia Decided: JUL 8 1982

38436. BUTTRUM v. THE STATE.

WELTNER, Justice.

The defendant was indicted for the murder of Demetra Faye Parker and the theft of her car. She was convicted on both counts and sentenced to death for the murder and ten years for motor vehicle theft. The jury in recommending the death penalty found the existence of four statutory aggravating circumstances. The victim was raped, sodomized and stabbed 97 times during the early morning hours of September 3, 1980, and her body was discovered by the manager that morning in her room at a motel where she was a guest. The defendant and her husband were also occupants of the same motel. The key to defendant's room was found on the counter in the motel office. Upon inspection of their room, a bloody wash cloth and bar of soap was found. The police were notified and warrants were issued for both defendant and her husband. They were arrested in Florida and returned to Georgia. The husband was tried first, convicted and sentenced to death. He committed suicide while his appeal was pending in this Court.

1. We will deal first with errors claimed during the guilt-innocence phase of the trial.

Enumerations of error 3 and 4 contend the trial court erred in denying defendant's motion for change of venue and failing to disqualify 2 jurors who had formed an opinion as to guilt. The defendant argues that by reason of extensive publicity from all the news media, a fair trial was impossible.

"'The test as to whether pretrial publicity has so prejudiced a case that an accused can not receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such publicity.' Dampier v. State, supra [245 Ga. 427, 431 (265 SE2d 565) (1980)]. 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Irvin v. Dowd, 366 U. S. 717, 723 (81 SC 1639, 6 LE2d 751) (1960)." Messer v. State, 247 Ga. 316 (4) (276 SE2d 15) (1981).

In the present case, 22 prospective jurors were excused for cause. A majority of the 42 prospective jurors put upon defendant stated that they had been exposed to varying degrees of publicity. All stated unequivocally that they could put aside any opinions they had and reach a verdict based on the evidence. There is no merit in these enumerations.

2. Enumeration of error 5 contends the trial court erred in overruling her motion to suppress the evidence obtained from her motel room, statements given to arresting officers, and evidence obtained from the victim's car.

The defendant first argues that evidence obtained from the motel room on September 3 without a search warrant should be suppressed because rent had been paid in advance until September 5, and she and her husband were therefore still in constructive possession. The motel owner-manager found the key to defendant's room on the counter in the office on the morning of September 3, and upon inspection discovered that all of their personal belongings had been removed from the room, whereon he concluded that they had abandoned the premises. Having abandoned the premises, defendant no longer had any expectation of privacy, and may not complain of the entry and search of the room.

The defendant contends that her statement given to FBI agents in Florida should be suppressed because the arrest warrant was invalid for two reasons. First, that the justice of the peace system is unconstitutional because it operates under a fee system, and, secondly, that the justice of the peace who issued the warrant was disqualified because he was also a deputy sheriff.

Appellant's attack upon the present justice of the peace system is without merit. The Georgia statutes subsequent to the 1977 amendment satisfied the constitutional requirements set forth in Connally v. Georgia, 429 U. S. 245 (97 SC 546) (1977). Roberts v. State, 243 Ga. 604 (5) (255 SE2d 689) (1979).

The second contention of defendant--that the issuing magistrate was a deputy sheriff and hence disqualified from issuance of an arrest warrant--must be considered in light of all the facts and requirements of law as to arrest warrants.

In Thompson v. State, 248 Ga. 343 (SE2d 266) (1981), we disapproved of a per se rule in Fourth Amendment cases. In the present case the defendant was arrested in Florida pursuant to an FBI fugitive warrant issued in good faith reliance on the Georgia arrest warrant regular on its face. While there may have been some technical deficiency in the status of the issuing magistrate, we find nothing which would require suppression of the evidence obtained and of the statements of the defendant made at the time of her arrest. Michigan v. DeFillippo, 443 U. S. 31, 35 ( SC , LE2d ) (1979).

The remaining ground of defendant's motion to suppress concerned the evidence obtained from the victim's car. A defendant has no standing to complain of the search of premises or property of another. Cervi v. State, 248 Ga. 325 (2) (282 SE2d 629) (1981).

3. Enumerations of error 6 and 7 contend that the trial court erred in placing upon defendant the burden of proof as to her special plea of mental incompetency, and in using the word "sanity" rather than "competency" in his charge. The burden of proof upon a special plea is on the defendant. Banks v. State, 246 Ga. 178 (3) (269 SE2d 450) (1980); May v. State, 146 Ga. App. 416 (246 SE2d 432) (1978). Nor do we find any error in the charge on the special plea.

4. Enumeration of error 8 contends the trial court erred in denying defendant funds to employ a psychiatrist, field investigator and forensic criminologist. The defendant does not contest any of the evidence presented against her, nor was any showing made at the hearing held on the motion as to what benefits could be gained by granting her funds for the hiring of such experts.

We recently held in Sable v. State, 248 Ga. 10 (6) (282 SE2d 61) (1981), that: "A criminal defendant on trial for his liberty is entitled on motion timely made to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." The defendant in this case made no contention that any critical evidence was subject to varying opinion, but in answer to the trial court's inquiry as to what further test he wanted stated: "At this point in time, no, there is not. If there is one, we will let the court know before the week expires." We cannot say, based upon this record, that the trial court abused its discretion in denying the motion for funds for expert witnesses. Messer v. State, 247 Ga. 316 (1) (276 SE2d 15) (1981).

5. Enumeration of error 9 complains of the admission in evidence of a letter written by defendant. The letter introduced at the guilt-innocence phase of the trial was written to the chief jailer. The letter was not solicited, nor was it the result of any interrogation, and sought to relieve her husband of any blame for the murder and rape of the victim by stating that she had coerced him into participating in the crimes. The trial court did not err in admitting this letter. Stevens v. State, 247 Ga. 698 (7) (278 SE2d 398) (1981).

6. Enumerations of error 11 and 12 contend the trial court erred in admitting testimony of a conversation with defendant's husband in her presence, and the charge of the court on conspiracy.

The testimony objected to occurred on the night of the crime when the witness, the defendant and her husband were riding around and he testified as follows: "He

asked me if I knew where I could get him a girl at. Q. What did you reply? A. I said, won't your wife get mad at you for talking like that? No, as long as she gets to go with her first." This testimony had a direct bearing on the contended conspiracy between defendant and her husband. The statements made by the co-defendant in the presence of appellant were admissible. See Sprouse v. State, 242 Ga. 831 (2) (252 SE2d 173) (1979), and cits. There was no error in admitting this testimony, or in the charge concerning conspiracy.

7. Enumeration of error 1 contends the trial court erred in allowing the testimony of Dr. Henry Adams at the sentencing phase of her trial. The defendant argues that the only way an expert witness may give his opinion is in response to hypothetical questions based upon facts in evidence.

It has long been the rule in this state that an expert witness may give his opinion as long as he states the facts on which he bases his conclusion. The fact that an expert's opinion may be based in part on facts not in evidence goes to the weight and credibility, not to its admissibility. Redfield v. State, 240 Ga. 460 (1) (241 SE2d 217) (1978) and cases cited. There is no merit in this enumeration of error.

8. Enumeration of error 10 complains of a letter introduced at the sentencing phase. The letter was written by defendant to her husband while both were in jail awaiting trial. The letter was given to a guard for delivery. Under rules of the jail imposed by the sheriff, all communications between prisoners were to be read and anything out of the ordinary reported to the sheriff. The letter contained an incriminating statement and the

note also contained a statement indicating knowledge that notes passed between them were read by the guards.

The defendant objected to the admission of this letter, contending it was a confidential communication between husband and wife under Code Ann. § 38-418 (a, 1), and excludable. The trial court excused the jury and held a hearing in which it found that there must be some expectation of confidentiality to be privileged under this court's holding in Lowry v. Lowry, 170 Ga. 349 (6) (153 SE2d 11) (1930). The court further found that the note itself indicated that their messages were being intercepted and that defendant had no reasonable expectation of confidentiality. The trial court's finding that the letter was not a confidential communication being supported by the evidence, we find no merit in this enumeration of error.

9. Enumeration 13 contends it was error to allow the State to introduce a prior conviction for simple assault at the sentencing phase without prior notification as required by Code Ann. § 27-2503. The State introduced evidence of a prior guilty plea to the charge of simple assault after the defendant had presented several witnesses who testified as to her nonviolent nature.

The testimony introduced by defendant was in the nature of character evidence and it was not error to admit this evidence as rebuttal. Hearn v. State, 145 Ga. App. 469 (2) (243 SE2d 728) (1978); Mize v. State, 240 Ga. 197 (6) (240 SE2d 11) (1977).

10. Enumeration 14 contends the Unified Appeal Procedure is unconstitutional. All of defendant's contentions have been decided adversely to her in Sliger v. State, 248 Ga. 316 (282 SE2d 291) (1981) (cert. den.

U. S. (102 SC 1442, LE2d ). There is no merit in this enumeration of error, and the trial court did not err in overruling her motion for new trial as contended in enumeration 15.

SENTENCE REVIEW

As required by Georgia Laws, 1973, p. 159, et seq., (Code Ann. § 27-2534 (c) (1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury and the evidence concerning the crimes and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor.

The defendant contends that under the holding of the United States Supreme Court in Eddings v. Oklahoma, U. S. (102 SC 869, 71 LE2d 1) (1982), that the court should have been instructed to consider the person of the defendant as a young and deprived girl with a sad and complex life. In the sentencing phase the court allowed the defendant to present several witnesses who testified as to her deprived upbringing, and to other factors in her childhood. There is no merit that the jury was precluded from considering these factors, as they were advised to consider all the evidence presented in mitigation.

The jury found the following aggravating circumstances: The offense of murder was committed while engaged in another capital felony, to wit, rape, and that the murder was outrageously, wantonly vile and inhuman in that it involved torture, depravity of mind and battery to the victim. The jury was instructed

separately as delineated by this court in Hance v. State, 245 Ga. 856 (3) (268 SE2d 339) (1980). The jury made a specific finding and found all three factors of Hance, supra. We have reviewed the record and find that the aggravating circumstances as found were fully supported by the evidence, under the stimulus of Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

We have reviewed the charge of the trial court to the jury in this case and found it not subject to the defects dealt with in Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977), or in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977).

This court has independently reviewed the record as mandated by the Unified Appeal Procedure and has found no addressable error with the exception of the issues raised in Enmund v. Florida, U. S. ( SC , LE2d ) (Case No. 81-5321), recently decided by the U. S. Supreme Court. The evidence in this case shows that prior to leaving the crime scene where the victim was murdered, this defendant cut the victim across the abdomen with the murder weapon and when asked why, she stated that this was the only place left to cut her and that "that girl sure didn't want to die." Therefore no issue is raised as to the direct and active participation of this defendant in the murder.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that similar cases listed in the appendix support the affirmance of the death penalty.

This was a particularly brutal murder in that the victim was raped, sodomized and stabbed 97 times after

letting the defendant into her motel room in the early morning hours under the pretense that something was wrong with her baby. Thereafter the defendant and her husband robbed the victim and stole her automobile for the purpose of making their escape from the scene. The 15 cases in the appendix in which the death penalty was imposed support the death penalty in the case. All of these cases involve the deliberate, unprovoked killing of a victim in conjunction with a sex crime, and thus show the willingness of the jury to impose the death penalty similar circumstances.

The crimes of Janice Buttrum can only be described as butchery and barbarism. The sentence of death is neither excessive nor disproportionate.

Judgment affirmed. All the Justices concur, except Hill, P.J., who concurs in the judgment only. Gregory, J., dissents to division 7 and the affirmance of the death sentence.

APPENDIX

McCorquodale v. State, 233 Ga. 369 (211 SE2d 577) (1974); Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975); Gibson v. State, 236 Ga. 874 (226 SE2d 63) (1976); Coleman v. State, 237 Ga. 84 (224 SE2d 911) (1976); Dix v. State, 238 Ga. 209 (232 SE2d 47) (1976); Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977); Spraggins v. State, 240 Ga. 759 (243 SE2d 20) (1978) (affirmed on resentencing, 243 Ga. 73 (252 SE2d 620) (1979); Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978); Presnell v. State, 241 Ga. 49 (243 SE2d 496) (1978) (affirmed after remand from U. S. Supreme Court, 243 Ga. 31 (252 SE2d 625) (1979); Johnson v. State, 242 Ga. 649 (250 SE2d 394) (1978); Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979) (affirmed on resentencing, 246 Ga. 261 (271 SE2d 352) (1980); Bowen v. State, 244 Ga. 495 (260 SE2d 855) (1979); Brooks v. State, 244 Ga. 574 (261 SE2d 379) (1979) (addendum 246 Ga. 262 (271 SE2d 272) (1980); Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Nelson v. State, 247 Ga. 172 (274 SE2d 317) (1981).

ENUMERATION OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT PERMITTED THE TESTIMONY OF DR. HENRY ADAMS AS TO HIS DIAGNOSIS AND PROGNOSIS OF THE APPELLANT BASED EXCLUSIVELY UPON HEARSAY EVIDENCE NOT BEFORE THE JURY

The Legislature of Georgia has provided for use of the expert witness quite specifically. "The opinions of experts, on any question of science, skill, trade, or like questions, shall always be admissible; and such opinions may be given on the facts as proved by other witnesses." Ga. Code Ann. Sec. 38-1710. The basis for the opinion of Henry Adams was not "facts proved by other witnesses," but was set out in response to the prosecutor's questions as follows:

"Q: Doctor, have you had occasion to make professional studies of Janice Buttrum, as is relevant to the Murder and Rape of Demetra Parker?

A: Yes, I have.

Q: All right, what did you do pursuant to your study?

A: I reviewed all the F.B.I. Reports, her confessions, reports from Central State Hospital, and I looked at the autopsy report, and some of the photographs of the victim. . .

In order to fairly access the appropriateness of the testimony of Henry Adams, it may be useful to consider more likely testimony which could have been offered at the time of the sentencing trial. As a background for this supposition, this Court's statement in Smith V. State may be useful:

> "But we think it is also true that if the nature of the question is such that the factors leading to a conclusion are not known to the common or average man, but are among those things shrouded in the mystery of professional skill or knowledge then the light of that knowledge should not be withheld from the jury because of such a fine distinction in the ordinary rules of evidence." (citing Metropolitan Life Ins. Co. V. Saul, 189 Ga. 1, 9, 5 S.E.2d 214 (1939).

As the record and testimony of Appellant's competency trial indicate, she underwent a lengthy and thorough evaluation at Central State Hospital. Had the evidence of Henry Adams been offered through the testimony of Dr. Perez (T. Competency Trial, p. 550-573), we would expect to argue at this juncture that it was improper for his opinions to invade the province of the jury and inappropriated to speculate about the Appellant's future behavior. If the

facts which the evidence in the case tends to establish." The Georgia Law of Evidence, Thomas F. Green, Jr., Section 111, 272 (1957, supp. 1980).

Dr. Adams gathered his hearsay evidence, determined its admissibility and weight, decided the fate he would select for Janice and made his recommendation to the jury. Dr. Adams went so far as to reject the conclusions of Dr. Perez and his team of psychiatrists, psychologists and nurses (none of which was before the jury), and expressed his own frightening predictions of Janice's future. This is astounding, and patently unfair. Nevertheless, this man was qualified by the trial court as an expert and was allowed to speculate as to the future of an eighteen year old girl without ever having seen her or having been advised of the facts before the jury, all with the court ascribed enhanced status of expert.

Once it is recognized that the testimony of Henry Adams was improper perhaps the significance of the error should be addressed. Henry Adams boldly advised the jury that in his expert opinion that Janice Buttrum would likely repeat her crime (T. Trial Vol. III, pp. 1823). The trial Judge defined then charged the jury to consider this "depravity of mind" to the jury in a manner which keyed in with Adams' diagnosis and their deliberation of her penalty (T. Trial Vol, III, pp. 2209-2210). Henry Adams was considered to be so important to the prosecutor's case that he was the only witness called in aggravation. Beyond any doubt, his testimony was not harmless.

**ENUMERATION OF ERROR NO. 2**

APPELLANT'S DEATH SENTENCE CONSTITUTES THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THAT IT WAS IMPOSED BY A JURY THAT WAS INFECTED BY EMOTIONALISM, PASSION AND PREJUDICE AND DID NOT RECEIVE CLEAR OBJECTIVE SENTENCING GUIDELINES.

It has been held that the imposition of the death penalty is not per se cruel and unusual punishment violative of the Eighth Amendment to the Constitution of the United States. However, a death sentence that is imposed in an arbitrary or capricious manner, by a jury improperly guided in its discretion is cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976); Godfrey V. Georgia, 446 U.S. 420, 100 S Ct. 1759 (1980), and if the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factors then it shall be vacated. Ga. Code Ann. Sec. 27-2537(c)(7).

The following events which preceded Appellant's receiving the death sentence, when collectively considered, evidence the presence of an atmosphere of emotionalism, passion and prejudice which Appellant contends affected the jurors' decision to impose the death sentence.

1). The tremendous amount of pretrial publicity, coupled with the actions of the Trial Court in response

sentence be, and appear to be, based on reason rather than on caprice."

Id. at 430 U.S. 356.

Wherefore, the Death Penalty Statute found at Georgia Laws 1973, pp. 159-165; Georgia Code Ann. Sec. 27-2534.1, et. seq., as applied to defendant in this case yielded an arbitrary sentence that was the product of emotionalism, passion and prejudice contrary to Article I, Sec. I, Par. II and III of the Georgia Constitution, Ga. Code Ann. Sec. 2-102, 2-103 and the Eighth and Fourteenth Amendments to the United States Constitution. Further, the process by which the jury is allowed to exercise subjective discretion in returning a death penalty violates the same constitutional protections. Ga. Laws 1974, pp. 352, 353; Ga. Code Ann. Sec. 27-2302.

7). The trial court allowed in evidence testimony by Dr. Henry Adams that Appellant was an anti-social personality, as well as a case of paraphilia sexual sadism (T. Trial Vol. III, p. 1822, see Enumeration of Error No. 1 ). He then stated he would expect it (similar acts) to continue. (T. Trial Vol. III, p. 1823). For reasons set out in Enumeration of Error No. 1 allowing this testimony was error; the magnitude of the statements made by Dr. Adams obviously aroused the emotions and

prejudice of the jury.

8). The improper remarks of the District Attorney in his closing argument in the trial in chief and the sentencing trial also caused the jury to be motivated by passion and prejudice.

Mr. Williams stated:

> "Defense? There is none. There has not been one iota of evidence to indicate that this Defendant did not do what she is charged with. . ."
> (T. Trial Vol. II, p. 1713).

Mr. Williams later in his closing argument to the jury during the trial in chief read a quote from ". . .Former Federal Judge of this State and Attorney General of the United States", stating that:

> "We're just not tough enough or strong enough to have a safe society" . . .
> "We're constantly ringing out hands about how we can rehabilitate people, and worry very little about the victims of crime. The truth is: There are alot of bad people who ought to be locked up to protect the rest of us, and unless we're willing to face that, then we really don't deserve to have a safe society"
> (T. Trial Vol. II, p. 1717)

These transcript excerpts illustrate the obvious . . . experts often differ in their opinions on matters within their field of expertise. In this type of situation, where there is "critical evidence whose nature is subject to varying expert opinion", the Court in Barnard directed that the trial court appoint an expert of the defendant's own choosing to insure that the defendant receives his due process rights (514 F.2d 744 at 746, emphasis supplied). Should the protection of due process rights be more zealously guarded in death cases? Woodson V. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976), and Gardner V. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977) unequivocally answer in the affirmative.

Appellant's expert assistance was limited by her financial resources. Barnard mandates that the availability of expert testimony required in presentation of an effective defense not be restricted by indigency. In United States V. Pate, 345 F.2d 691 (7th Cir. 1965), the Court stated "the denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process." 345 F.2d 691 at 695.

The trial court's failure to appoint expert assistance for the Appellant not only denied her due process of law, but denied her her Sixth Amendment right to effective assistance of counsel as well. In Hintz V. Beto, 379 F.2d 937 (5th Cir. 1967) the Court states "that effective

and minimally effective representation of counsel'" Blake at 20, quoting 488 F.2d 1154 at 1163. Appellant contends that this interrelation is even more critical in capital cases. Sending the Appellant to a State facility for psychiatric evaluation or examining her through an appointed expert is not an acceptable alternative to the hiring of an independent psychiatric expert. This is apparent when, under Georgia Law, any statements made by the Appellant to these State employees are not privileged in accordance with Ga. Code Ann. Sec. 38-418. Massey V. State, 226 Ga. 703 (1970); Moody V. State, 244 Ga. 247 (1979). The psychiatrist or psychologist may later testify at trial to any and all incriminating statements made by a patient.

Appellant's right to effective assistance of counsel includes access to at least such independent experts as necessary to rebut the power of the State. Despite the attempts of Appellant's counsel, these needs were not adequately met. The Court erred in denying the Appellant expert assistance equivalent to that provided to the State.

H. THE TRIAL COURT WAS UNDER NO STATUTORY NOR CONSTITUTIONAL DUTY TO PROVIDE APPELLANT WITH FUNDS TO EMPLOY A "PRIVATE" INDEPENDENT PSYCHIATRIST, FIELD INVESTIGATOR AND FORENSIC CRIMINOLOGIST UNDER THE FACTS OF THIS CASE. (Appellant's Enumeration of Error No. 8).

Appellant alleges that the trial court erred in refusing to provide her with additional funds to employ a "private" or "independent" experts in the preparation of her defense.

On February 24, 1981, Appellant's counsel along with her husband's attorney reasserted their Motion for Funds to Employ a Private Psychiatrist, Field Investigator and Forensic Criminologist. The trial court had previously reserved ruling on Appellant's Motion for an Independent Forensic Criminologist, but had directed the crime lab to retest anything that Appellant desired, or conduct additional tests that Appellant's counsel might deem necessary. (T. Motion, 93-94, 95-96 on February 24, 1981). On the issue on appointing an independent forensic criminologist the court inquired of counsel for Appellant's

husband, Mr. Milton as follows:

> Court: "Is their some further test you want done?
>
> Mr. Milton: At this point in time, no, there is not. If there is one, we will let the court know before this week expires. It is not within the scope of this motion so I don't believe that --
>
> Court: (interposing) Well, why don't you -- if you don't want any further tests done, why do you want funds -- this motion is to employ a field investigator, forensic scientist, and what else?
>
> Mr. Milton: Yes sir, as stated."

(T. Motion at 94 of February 24, 1981).

Appellant has failed to show this Court what additional forensic testing if any was necessary for an adequate defense on behalf of the Appellant. Also, all of the Appellant's incriminatory statements acknowledged that the victim remained

Q What is a paraphilia?

A Again, this is where an individual might cause an inanimate object, and non-consenting adults pain and humiliation as a method of achieving sexual excitement and arousal.

Q Is sexual sadism a type of paraphilia?

A Yes, it is.

Q What is sexual sadism?

A This is when the individual becomes excited or turned on by the suffering humiliation and pain of the victim, typically a non-consenting individual. When the disorder really becomes severe, they may torture, kill, mutilate their victims. It is a repetitive kind of activity that continues until the individual is apprehended, or stopped in some way or another.

Q Are there different forms of sadism?

A Yes, there is. One, a difference in severity. In some cases, it's enough with some of these things that the individual simply be shamed or humiliated to turn them off. In other cases, it becomes quite savages--rape and these kind of cases. The types can vary extensively from the individual who gets sexually excited by urinating on someone to the individual who engages in rape with harm

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coming to the victim, being turned on by the blood, or whatever.

Q At what age do these forms of sadism generally begin?

A You can see them fairly early. It's usually around the age of puberty when the sexual drive begins to manifest itself; because of the kinds of experiences they may have had, they begin to get turned on to this. It's not unusual for this kind of disorder to increase in intensity, particularly when it's associated with the anti-social personality, so that they have to have more, and more, and more extreme forms of this activity in order to get excited or turned on.

Q What is the course of sexual sadism when it's practiced with a non-consenting partner?

A Well, it would continue; it's like any other sexual activity. If that's what turns them on, then that's what they're going to do. It is a biological drive with biological rhythm. It's like heterosexuality, in that sense.

Q All right. Doctor, dealing with sexual murder, is there a relationship between the murder and the sex act?

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MR. BROWN: If it please the Court, Your Honor, may I interrupt and again object to this whole line of questioning to be irrelevant in a sentencing/aggravation phase. This is the case of Janice Buttrum; we're not trying -- we're not learning a course in psychology. I don't think this is relevant to the issues before the Court.

THE COURT: All right, I'll take your objection under advisement and we'll see.

Q Doctor, dealing with sexual murder, is there a relationship between the murder and the sex act?

A Yes, because the murder is -- occurs because this is the way -- it is the sex act, to some extent, in these extreme cases.

Q All right. How do these individuals induce this sexual pleasure?

A I beg your pardon?

Q How do these individuals induce their sexual pleasure?

A By the pain of the victim.

Q All right. Dr. Adams, have you had occasion to make professional studies of the Defendant, Janice Buttrum,

as is relevant to the Murder and Rape of Demetra Parker?

MR. FAIN: Excuse me, Your Honor. I would object to that question on the grounds that we've stated before, that this gentleman is unlicensed; he -- there has been no background laid as to what he knows about any of this. He has no background or basis to make such an opinion. We think such an opinion would be totally improper. We think this gentleman testifying as an unlicensed practitioner is in violation of the Law and violates our client's right to due process and to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendment.

THE COURT: I'll overrule your objection. Proceed.

Q Doctor, have you had occasion to make professional studies of Janice Buttrum, as is relevant to the Murder and Rape of Demetra Parker?

A Yes, I have.

Q All right, what did you do pursuant to your study?

A I reviewed all the F.B.I. Reports, her confessions, reports from Central State Hospital, and I

looked at the autopsy report, and some of the photographs of the victim.

Q Do you recall the items in Central State's report that you reviewed?

A Yes ==

MR. BROWN: (Interposing) If it please the Court, again I object. We are talking about hearsay evidence, and they're not admitted before this Court. And it's totally inappropriate for him to render an opinion that's not even a hypothetical opinion, on hearsay evidence, items that are not in evidence before this Court and Jury.

THE COURT: Overruled.

Q Do you recall what you reviewed in the Central State report—the items that you reviewed?

A Yes. The social history, the psychiatric report, the psychological evaluation, ward notes.

Q Did you have occasion to look at photographs of the crime scene?

A Yes, I did.

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Q Have you come to certain conclusions about the Defendant, based upon your study and your background--professional background?

A Yes, I have.

MR. FAIN: Excuse me, Your Honor. I would object to that opinion on basically -- I gather he's talking about basing his opinion on opinions of other people and upon declarations of third and fourth parties. We feel that any opinions --

THE COURT: (Interposing) Well, I'm going to give you a chance to cross-examine him.

MR. FAIN: I understand that, Your Honor; but I feel that we need to raise the objection now, and that we would raise the objection that, one, it's based upon hearsay; two, it's based upon conclusions made by others—opinions of others, people not under his control or authority; that it contains -- based upon facts not in evidence, facts not supported by the evidence; that the testimony is irrelevant and calculated

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to inflame and prejudice the Jury; and that it's an improper area for expert opinion, and it goes to, I gather, the state of mind of the Defendant. And, Your Honor, we feel that all of this is improper, and to allow this gentleman to go on would be to deny Janice Buttrum her rights to due process and to a fair trial, as stated in the Fifth, Sixth, Eighth, and Fourteenth Amendments, and we would make that objection, Your Honor, at this time.

THE COURT: Overruled.

Q Have you come to some conclusions about the Defendant based upon your studies?

A Yes, I have.

Q All right. Dr. Adams, what is, quote, "stimulous hunger"?

A This is a term used to describe the asocial personality for they're constantly hungry for stimulation, bored; and, therefore, they're likely stir up difficulties, get involved in a lot of asocial activity--drugs, sex, whatever--in order to excite them, turn them on.

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Q How does that term relate to Janice Buttrum?

A From the evidence that I have, that is one aspect of her personality.

MR. FAIN: Your Honor, I don't want to continue to jump up and down. If the Court would just recognize a continuing objection based on previous grounds and reasons stated?

THE COURT: All right.

MR. FAIN: I'm sorry, I didn't understand.

THE COURT: That'll be fine.

MR. FAIN: Would the Court recognize --

THE COURTP (Interposing) I recognize your continuing objection.

MR. FAIN: Okay, thank you, Your Honor.

Q What does the term "sociopath" mean?

A Essentially, that's an earlier term that was used by the DSM II, the Classification Manual, that has now been replaced by the Anti-social personality in the DSM III, the latest version.

Q Okay. What does polymorphous sexual perversion mean, that phrase?

A It essentially means that the individual will engage in almost any activity that will turn them on of a sexual nature, varying from heterosexual to homosexual,

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to whatever.

Q All right. Now, you referred to the DSM III, what does that mean, and what is it?

A That's the official classification of the American Psychiatric Association that's used commonly by Mental Health personnel.

Q For what purpose?

A To classify and diagnose cases.

Q Have you come to some clinical impression of the Defendant, Janice Buttrum, based upon your investigation?

A Yes. Essentially, based on the evidence I have, I would call her an anti-social personality, as well as a case of paraphilia sexual sadism.

Q All right. Based upon your investigation, your background, and your expertise in this area, do you have an opinion as to the potential for other acts?

MR. FAIN: Excuse me, Your Honor. Of course, we would renew our previous objections as the Court has stated they would make that and understand that to be a continuing objection; but we would also add that this is a totally improper area for expert testimony. I

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gather he's about to speculate or predict some sort of criminal behavior and, Your Honor, we just feel that that's totally improper, on the same Constitutional grounds that we urged before.

THE COURT: Overruled.

Q All right, let me ask you that question again. Dr. Adams, based upon your investigation into this Defendant, your professional background, your expertise in the area of sexual disorders, and your clinical impression as to sexual sadism in this particular case, do you have an opinion as to the potential of other acts?

A Part of the definition of sexual sadism is repetitive acts; and yes, with this kind of diagnosis it's kind of -- you would expect it to continue.

MR. WILLIAMS: That's all I have.

MR. BROWN: If it please the Court, at this point in time, I would respectfully move for a mistrial on the same basis of the Constitutional arguments which Mr. Fain previously made, and which I think the Court considered to be continuing.

THE COURT: All right, I'll overrule your Motion for Mistrial. I'll also

1823 overrule your objection to the whole

of the witness's testimony as being irrelevant that he made and I said I'd take under advisement.

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CROSS-EXAMINATION: Mr. Brown

Q Dr. Adams, as a general rule, do you perform such explicit and potentially harmful diagnoses, or potentially serious diagnoses as you have done of Janice Buttrum on a regular basis, without ever seeing or personally talking to your patient?

A Yes, it is done, and it's done fairly common. The decision for me not to see her is yours counselor.

MR. BROWN: If it please the Court, that is unresponsive and untrue, and I would ask that that be stricken from the record.

THE COURT: Well, your question was: Did he do it? And he responded that: "It's done"; is that the unresponsiveness?

MR. BROWN: He responded that I had denied him the opportunity to evaluate my client. That is untrue.

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THE COURT: Well, I'll strike that from the record and instruct the Jury to ignore that portion of his answer.

Q And do I understand, then, Dr. Adams, that you regularly do this sort of evaluation without seeing the patient?

A I have done it; it has been done in other cases.

Q And do you feel like it's reliable?

A It's fairly accurate.

Q Well, I mean how accurate? Janice Buttrum is on trial for her life.

A Well, in terms of how you evaluate a patient, you don't only take their words, there's a great deal of background evidence and other data that goes into it, as well as the examination. Granted, if you actually examine the patient, you would feel much more comfortable about the accuracy of your opinion.

Q And you see the need in this case, from what you said a moment ago, that that would be appropriate?

A Certainly it would be.

Q Now, you considered reports from Central State Hospital, is that also correct? Was that part of the

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Q Yes sir, the second page of what I just handed you.

A Yes, I see that.

Q What is the final diagnosis?

A It says "No medical diagnosis". Can I also refer to the other reports that's in this document?

Q Are you referring to the preliminary report on admission where there was a possibility of anti-social personality, which was later ruled out?

A I'm referring to ==

Q (Interposing) Is that what you're wanting to tell us about?

A I'm referring to the initial ==

MR. WILLIAMS: (Interposing) Well, Your Honor, I think he's arguing with the witness.

THE COURT: Let him finish his answer before you ask him the next question.

A I'm referring to the total document "Psychiatry Report" -- excuse me, the Psychological report and others. But, I went through all of their information, and simply because they did not decide that there was no medical diagnosis--I used their facts--I don't have to come to their

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same conclusions, counselor.

Q Certainly not; but you're aware that in those reports which you used that there was a team evaluating her. Are you familiar with how things are done at Central State on these type of evaluations?

A Since I was a consultant there for about five years, yes, I am.

Q Okay, so it's done with an observation over a period of time; is that correct?

A Right.

Q Clinical observation, ward observation, testing; is that also correct?

A Right.

Q Several psychologists involved?

A Right.

Q And then, would you tell the Jury what a "staffing" is, as the term is used there?

A Essentially this -- uh-huh. This is essentially for psychiatrists, psychologists, nurses, ward attendants, and a group of people discuss the case.

Q And traditionally, before a final conclusion is reached is that what occurs at Central State?

A Right.

Q A staffing? Which means the input of the psychologists, the nurses, and the psychiatrists to come

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to a conclusion?

A Right.

Q And the conclusion in this case was no mental disorder, but you disagree with that; is that correct?

A I certainly do disagree with that.

Q Okay. From what you recall, is it also accurate that they observed Janice Buttrum for about seven weeks?

A Right.

Q Dr. Adams, with respect to reliability of what you're telling us, do you recall in your letter to the District Attorney on July the 30th, that you stated "That the conclusions"-- let me paraphrase it -- "that the conclusions that I have reached in this case should be viewed with caution since I have not examined the patient, and the evaluation is based largely on her case history that you went to me"; is that correct?

A That's correct.

Q Do you recall if you have ever made a written comment about this sort of diagnosis technique -- or diagnostic technique? Have you ever made a comment in any of your books?

1829

Q Isn't it awfully hard for you, without information from the time -- after the time she was seventeen -- may I assume that you don't have specific history of her after that time? You're making this -- let me rephrase the question. You're basing your diagnosis on what existed when she was seventeen, and then because she became eighteen, you just made another assumption and fit her into that category; is that right?

A I assumed she became eighteen.

Q But that's all the difference, I mean, there wasn't any ==

A (Interposing) That's the only difference. And with the earlier -- if you'll look at the earlier criterion, it fits that quite well; or, they're essentially the same diagnosis. The only thing that changes is the age.

Q Now, conduct disorders really don't rise to the level of personality disorders; isn't that correct?

A What do you mean?

Q They are not classified as personality disorders. Aren't conduct disorders listed elsewhere as kind of a ==

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A (Interposing) Childhood, adolescent, and other types of disorders.

Q Problems somebody might grow out of?

A Right.

Q You really don't want to affix a severe conclusion about a mental disorder on a younger person when they're still growing; isn't that correct?

A That's right. But, most of these disorders start at five, six, seven years of age.

Q And you really can't speak to what Janice Buttrum's condition or adjustment has been in Jail, and how that would affect your diagnosis? In other words, if Janice Buttrum has been able to make friends in Jail--get along with her cellmates--and adjust socially in that limited social atmosphere, she would be in contradiction to this diagnosis; is that correct?

A If that occurred. But, as a matter of fact, I talked to the female jailer and one of the prisoners today, and that has not occurred.

Q Okay, that would be total hearsay?

A Right.

Q From what two people said. You don't know about all the people she's been exposed to, or what she says; is that correct?

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MR. WILLIAMS: (Interposing) Well, Your Honor, she's his witness and he's leading her right through this thing. I'd ask her to answer the questions and be short, and explain them.

THE COURT: Well, I'll let him lead on these questions. But, now, when you get through with these, you need to ask questions on direct.

Q We talked about, and you understand, that Mr. Williams will have an opportunity to cross-examine you, don't you?

A Yes, I do.

Q And you still wanted to get up here and testify, isn't that right?

A Yes sir.

Q Janice, how old are you?

A Eighteen.

Q And when's your birthday?

A January 17th.

Q Of what year?

A 1963.

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THE COURT: There weren't any Motions. Were there any Motions for Mistrial?

MR. BROWN: Yes sir. We made a Motion for Mistrial with respect to the testimony tendered of Dr. Adams.

THE COURT: Okay.

MR. BROWN: And also on the basis of his qualifications as an expert in this Court.

THE COURT: All right.

MR. BROWN: At this point in time, we would renew that Motion on the basis of the same Constitutional objections we had then, and would also again move to strike his testimony in view of our position that he did not qualify as an expert witness according to the standards of the State of Georgia.

THE COURT: All right, I'll overrule and deny your Motion. What's your next Motion?

MR. FAIN: Your Honor, we would just simply move for a Directed Verdict in regard to all of the aggravating circumstances,

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to you on Saturday, unlike any eighteen-year-old female you or I have ever met or ever seen. Again, as I said to you before, I submit that there are two Janice Buttrams: One that you've been able to look at and see throughout this trial, and one who is a deviant pervert, a murderer, and a butcher. Do not be fooled by a pretty package. You heard about what a terrible background she came from. Well, there are literally thousands and millions of people who have come from poor, bad backgrounds who have become good, solid, law-abiding people. You and I both know some. That is no excuse for murder, and rape, and a blood bath on a nineteen-year-old girl. Pillars of the community don't commit brutal murders and participate in sadistic rape rituals. The lawyers want you to feel sorry for her. But, you stated at the very beginning that you believe in capital punishment and that you could return a death verdict against a female. Consider this: How bad does a case have to be before you can return a death verdict against her? How bad does it have to be? Can you imagine anything any worse than what you have heard in this case? Consider who was leading who. Who was the

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off without her. Potentially, could do it again. And yes, she's female, but Demetra Faye Parker is just as dead as she would have been had she first been stabbed, and stabbed mostly by a man. Finally, you've been asked to feel sorry for Janice Buttrum. Does Janice Buttrum feel sorry for anybody else? Did she ever express any regret for Demetra Parker? Did she ever express any remorse for her acts? Did she ever express any sorrow for Demetra's death? It's been one year ago tomorrow night—Tuesday night—that this occurred, and only yesterday did she make any outward and open statement of any sorrow, when she was in that seat in front of you fourteen. How can we feel any sorrow for her, when she cares less about us? Never a word of regret, not the first "I'm sorry". Who will be next? You? Your wife? Your daughter? Consider lack of remorse, until face-to-face with fourteen people. Consider who was really leading who? Who did all the action? Consider who was the real worst of the two. Demetra's life meant nothing. Did you hear anything that would indicate she felt bad about her acts, until yesterday--one year, almost to the day, from the crime. She has no more respect for you and this Court than she did for Demetra Faye Parker in the early morning hours of September the 3rd. Now, reasons for

punishment on young, teenage females? You have to look no farther than to the photograph of Demetra spread-eagle on the floor of a motel room. God save us all from Janice Buttrum. God save us all from the butchering mutilation of human flesh. God save us all from demoralizing indignation of a brutal rape. May Janice Buttrum never again haunt society. During the three-and-a-half days of voir dire, Mr. Fain and Mr. Brown talked to you about your church affiliation, view— religious views on capital punishment. Of course, we all know what, in the Old Testament, the Commandment "Thou Shalt Not Kill", "An Eye for an Eye", and so on. I found it interesting in Paul's letter to the Romans, Chapter 13, 1 through 4, where he wrote: "Let every person be subject to the governing authorities for there is no authority, except from God, and those that exist have been instituted by God. Therefore, he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good and you will receive his approval. For he is God's servant for your good, but

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doubt may arise out of a consideration of evidence, or from a lack of it, or insufficiency of the evidence. A reasonable doubt means just what it says, that is, a doubt of a fair mind, or an impartial Juror honestly seeking the truth. It is not an arbitrary nor capricious doubt, but it is a doubt arising from a consideration of the evidence, from a conflict in the evidence, or from a lack of evidence. As the Court has pointed out to you, a reasonable doubt is a doubt which is founded upon reason and for which a reason can be given. After giving consideration to all the facts and circumstances of the case, if your minds are wavering, unsettled, and unsatisfied, then that is the doubt of the Law.

I will go down these aggravating circumstances one at a time. Please remember that you must find beyond a reasonable doubt that one or more of these factual conditions existed in connection with the Defendant's perpetration of the act for which you have found her guilty, before the death penalty may be imposed.

The first is: That the offense of Murder was committed while the Defendant was engaged in the commission of another capital felony, to-wit: Rape. Georgia Law defines Rape, as follows: "A person commits rape when he has carnal

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knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by a male sex organ. I charge you that even though the Rape Statute is designed to punish male offenders, a woman may be guilty of rape if she aids or abets in the commission of the crime. In this connection, I shall further charge you as to the definition of Parties to a Crime. Under our criminal Code, every person concerned in the commission of a crime is a party to that crime, and may be charged with and convicted of commission of the crime. A person is concerned in the commission of a crime only if he or she: (1) Directly commits the crime; or (2) Intentionally causes some other person to commit the crime under circumstances such that the other person is not guilty of any crime, either in fact or because of legal incapacity; or (3) Intentionally aids and abets in the commission of the crime; or (4) Intentionally advises, encourages, hires counsel, or procures another to commit the crime. In other words, to find that the offense of Murder was committed while the Defendant was engaged in the commission of rape, you would have to find beyond a reasonable doubt that this Defendant aided and abetted a male individual,

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that the male individual had carnal knowledge of a female forcibly and against the victim's will.

I have already defined carnal knowledge. Now I will address the elements of "forcibly and against the victim's will". Consent to sexual intercourse, obtained through a present or immediate fear of serious bodily injury to the alleged female victim involved is the equivalent of no consent at all, and an act of intercourse consummated under such circumstances cannot be said to have been committed with the consent of the alleged female victim. To accomplish a criminal act "with force" and "against one's will", as given to you in this Charge, there must have been such a physical overpowering of the person involved so that such person's ability to withstand or resist the act was overcome and such person was powerless to resist, and there must have been involved the use of threat or violence by the accused against such person through which there was instilled in the mind of the alleged victim a present and immediate fear of serious bodily injury to the extent that you find such person did not give concurrence to such act, as a result thereof. Consent that is not accomplished

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by force in the way and manner I have just Charged, though given reluctantly, is not with force or against one's will. It matters not how the consent was obtained, or how reluctantly that consent might have been given, if there was at least part of consent upon the part of the victim during the transaction.

The second circumstance the State charges is: That the offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved torture to the victim.

The third circumstance the State charges is: That the offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved depravity of mind of the Defendant. Now, Black's Law Dictionary defines a depraved mind as follows: An inherent deficiency in a moral sense and rectitude. Rectitude is defined as the quality or state of being straight or having moral ingegrity. Now, the way I've worded that, that definition may be confusing, so let me repeat it: Depravity of mind is inherent deficiency in moral sense and rectitude. Rectitude is defined as the quality or state of being straight or having moral integrity. The word "depraved" has also been defined

as "marked by corruption or evil, or especially perverted."

The fourth Statutory aggravating circumstance alleged is: That the offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved an aggravated battery to the victim. In this regard, it is the Law in Georgia that a person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of the body useless, or by seriously disfiguring a body or a member thereof.

The Law requires that the presiding Judge give the Jury certain instructions in writing. I have prepared a written portion of this Charge as to the aggravating circumstance. These are typed out on separate sheets of paper and will be sent to you in the Jury Room. It's what those look like.

Now, if you do not find beyond a reasonable doubt that one or more of these aggravating circumstances which I have given you existed in the charged offense, then you would not be authorized to consider the penalty of death. In that event, the only penalty that the Law provides would be imprisonment for life, as provided by Law.

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or leniency which may be provided by Law, but you are simply to consider the sentence of death to mean death, and the sentence of life to mean life imprisonment.

The sentence to be imposed in this case is a matter entirely in your discretion. You may provide for a life sentence for this accused for any reason that is satisfactory to you. You may only impose the death sentence if you find beyond a reasonable doubt that one or more of the aggravating circumstances existed. You can only impose the death penalty if you do find that one or more of the aggravating circumstances I have submitted to you existed, but even if you find one or more to exist, it is not mandatory upon you to impose the death penalty. The Law vests the exclusive right to the Jury to make or withhold a recommendation of a death sentence.

Now, Ladies and Gentlemen of the Jury, I further Charge you that summation and argument of counsel is not evidence, and will not be considered as such. You may consider it or not, as you choose. In any event, the verdict must be based upon the evidence in the case as you find it, and not

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THE COURT: All right, if you'll hand it to the Clerk, please.

(VERDICT FORM TENDERED TO CLERK AND THEN TO COURT)

THE COURT: "In the Superior Court for the County of Whitfield, State of Georgia, State of Georgia vs. Janice Buttrum, Indictment 14,029, PUNISHMENT VERDICT OF JURY ON COUNT I - MURDER: We, the Jury, recommend and affix the Defendant's punishment as follows: B. Death. We further find the following aggravating circumstances: (1) The offense of Murder was committed while the Defendant was engaged in the commission of another capital felony, to-wit: Rape. (2) The offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved torture to the victim. (3) The offense of Murder was outrageously and wantonly vile, horrible, and inhuman, in that, it involved depravity of mind of the Defendant. (4) The offense of

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IN THE SUPERIOR COURT OF

WHITFIELD COUNTY

STATE OF GEORGIA :

vs. : CASE NO: 14,029

JANICE BUTTRAM :

ORDER

Defendant's Motions in the above-styled case having come on for hearing on the 23rd day of October, 1980, the same having been argued, and after consideration of same, the Court hereby:

1. Grants the defendant's Demand for Copy of Bill of Indictment and List of Witnesses.
2. Denies the defendant's Motion and Amendment to Motion for Funds to Employ a Field Investigator, A Forensic Criminologist and a Private Psychiatrist to Participate in the Defense Preparation and Trial.
3. Grants the defendant's Motion to Continue Arraignment.

SO ORDERED, this the 27 day of October, 1980.

J.S.C.C.C.

FILED & RECORDED
WHITFIELD COUNTY GA.
OCT 28 9 32 AM 80
CLERK OF SUPERIOR COURT

IN THE SUPERIOR COURT OF

WHITFIELD COUNTY

| | | |
|---|---|---|
| STATE OF GEORGIA | : | |
| | : | |
| vs. | : | CASE NO: 14,029 |
| | : | |
| JANICE BUTTRAM | : | |

**ORDER**

Defendant's Motion for Funds to Employ a Field Investigator, a Forensic Criminologist and a Private Psychiatrist to Participate in the Defense Preparation and Trial of the above Matter, and the Amendment to Motion for Funds to Employ a Field Investigator, and a Private Psychiatrist to Participate in the Defense Preparation for Trial for the above Matter; having come on for hearing before this Court February 24, 1981, the same having been heard and considered, is hereby DENIED, after being re-urged.

However, upon defendant's later reasonable request to the Court, the Court will direct the Crime Lab to test or re-test any evidence which the defendant reasonably feels ought to be tested or re-tested.

SO ORDERED, this the 25 day of February, 1981.

CHARLES A. PANNELL, JR.
JUDGE, SUPERIOR COURT
CONASAUGA JUDICIAL CIRCUIT

FEB 25 11 47 AM '81

IN THE SUPERIOR COURT FOR THE COUNTY

OF WHITFIELD, STATE OF GEORGIA

| | | |
|---|---|---|
| THE STATE OF GEORGIA | ) | INDICTMENT NO. 14,029 |
| | ) | |
| VS: | ) | |
| | ) | |
| JANICE BUTTRUM, | ) | |
| | ) | |
| Defendant | ) | |

A P P E A R A N C E S:

FOR THE STATE: HON. STEPHEN A. WILLIAMS
District Attorney
Conasauga Judicial Circuit
Dalton, Georgia 30720

FOR THE DEFENDANT: J. MIKE BROWN, ESQUIRE
Attorney at Law
101 Thornton Avenue
Dalton, Georgia 30720

MOTIONS
HON. CHARLES A. PANNELL, JR.
JUDGE SUPERIOR COURT
CONASAUGA JUDICIAL CIRCUIT
PRESIDING

August 19, 1981

TRANSCRIPT

PROCEEDINGS:

THE COURT: All right, this is another hearing on the case 14,029, State of Georgia vs. Janice Buttrum. It's my understanding there have been two more motions filed by the Defendant, which I need to hear and rule on. Is that correct, Mr. Brown?

MR. BROWN: That's correct, sir.

THE COURT: All right, which motion do you wish to take up first?

MR. BROWN: Your Honor, the --

THE COURT: (Interposing) I'm not sure I have your motions. (Pause) Well, I think the original of your motions is in the Clerk's file. I have a copy. We've got a new girl in the Clerk's Office in charge of criminal files now. I have a Motion for Continuance and a Second Amendment to Motion for Funds to Employ Field Investigator, Forensic Criminologist and Private Psychiatrist to Participate in Defense Preparation for Trial of the Above Matter, and Amendment

to a Motion for Private Psychiatric Examination and Testing.

MR. BROWN: Yes sir.

THE COURT: Which one do you want to take up first?

MR. BROWN: The one you just read first, Your Honor; it's a rather long title.

THE COURT: Okay.

MR. BROWN: That, primarily, is a Motion to allow the Defense to have funds to have a private psychiatrist or psychologist deal with our client and examine her, and also to have available, at the expense of the State, funds to hire a psychiatrist or psychologist to assist us in actually preparing the defense of Mrs. Buttrum. We bring these motions this late, at this point in time, due to disclosure provided by the District Attorney on August 13, 1981. That was provided to us at the end of the day set for -- or, end of the time set for the final motions in this case.

THE COURT: Well, I'm going to let you file your motions and I'm going to hear them.

MR. BROWN: Yes sir.

THE COURT: I mean, I'm not going to -- that's fine.

MR. BROWN: These motions are filed in response to that disclosure, in which, Dr. Henry Adams is disclosed as producing an opinion and a clinical impression of this Defendant. We feel that that is a significant turn of events, in that, the conclusions which he reaches are vastly different and in excess of the conclusions reached by the team at Milledgeville--the State psychologists and psychiatrists. We're very concerned about the potential impact of testimony of the nature which we would anticipate, in view of the written statement that he has provided. We feel like, if Mrs. Buttrum is to be afforded competent and effective counsel, we have got to have equal assistance in preparing to deal with this sort of testimony. We feel like this testimony

is so inflammatory and goes so far -- well, this potential testimony -- that we have to be in a position to counteract it. Now, we have no information as to whether the District Attorney has hired Dr. Adams, or if Dr. Adams is coming on a friendly basis, but Dr. Adams is an outside party. As far as we know, he is not a State employee; perhaps the University of Georgia, but he is not in the System as the psychiatrists and psychologists at Milledgeville are. We don't have access to a person like Dr. Adams, and we feel like in fundamental fairness, the dictates of the Fourteenth Amendment, Sixth Amendment, and Fourth Amendment of the State and Federal Constitutions demand that we be treated fairly and that we have an adequate opportunity to countermand this sort of very significant evidence. Our Motion for Continuance is filed for basically the same reasons, as an extension of this argument. We feel like, first of all, this disclosure

have to spend taxpayers' money just to be spending it, when that's already available.

MR. BROWN: Yes sir. Well, again, not to argue, but it's the -- when the District Attorney senses the need to go out and secure private psychiatric assistance in the prosecution, we sense that same need; and these motions are simply in response to that --

THE COURT: (Interposing) Well, I don't know what he did. I mean, you say that, but you haven't presented any evidence as to that fact. I'll deny your Motion for -- deny the Second Amendment to the Motion for Funds to Employ Field Investigator, Forensic Criminologist, Private Psychiatrist to Participate in the Defense Preparation for Trial of the Above Matter, and Amendment to a Motion for Private Psychiatric Examination and Testing. All right, that leaves us with a Motion for Continuance. Okay. Do you want

to present any evidence on this motion?

MR. BROWN: Okay, the motion -- no sir, that's in -- there are two facets to that. The first facet is: If our prior motion have been granted, we would have required time to follow through on the granting of that motion. The second basis is the fact that this testimony -- or proposed testimony -- is so different that we have our time planned very closely, we feel like it would necessitate at least a day or more to go to either Milledgeville or to sit down with Dr. Bullard to prepare to deal with this sort of adverse evidence; and we feel like we were pushing very closely with the time of trial and that this disclosure comes very late. That's the simple basis for that motion.

THE COURT: Well, you stated on your other motion -- I don't guess I got down to this fact -- that you haven't had time to prepare concerning this psychiatric testimony, and I

MR. BROWN: Yes sir.

THE COURT: Well, have you made -- let me ask: Have you made an effort to get in touch with the team at Milledgeville?

MR. BROWN: Yes, Your Honor.

THE COURT: In regards to this new revelation by the District Attorney last Thursday?

MR. BROWN: Yes sir; without going into the details of the Defense's preparation, we have made efforts which we feel are appropriate, and are trying to respond.

THE COURT: I just want to make sure you're making the effort. All right, I'll deny your Motion for Continuance. The trial is set for Monday morning, the 24th of August. Now, do you expect anything else to come up?

MR. BROWN: Assuming the District Attorney has no more disclosures today, Your Honor.

THE COURT: Well, I ask you: Do you have any more disclosures today?

MR. WILLIAMS: Not today.

THE COURT: Well, I asked last Thursday if you

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## CONSTITUTIONAL PROVISIONS INVOLVED

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

### AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

SECTION 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Code of Georgia

TITLE 38. EVIDENCE

PART I. GENERAL PRINCIPLES AND RULES GOVERNING ADMISSION OF TESTIMONY

* * *

CHAPTER 38-3. HEARSAY

38-301 Definition; when and why admitted

(a) Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.
(b) Hearsay evidence is admitted only in specified cases from necessity.

38-302 Original evidence, when

When, in a legal investigation, information, conversation, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence not as hearsay but as original evidence.

* * *

38-305 Res gestae

Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the res gastae.

38-306 Declarations by conspirators

After the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.

* * *

38-310 (5769) Books of account

The books of account of any merchant, shopkeeper, physician, blacksmith, farmer, dairyman, planter or other person doing a regular business and keeping daily entries thereof may be admitted in evidence as proof of such accounts, upon the following conditions:

1. That he kept no clerk, or else the clerk is dead or otherwise inaccessible, or for any other reason the clerk is disqualified from testifying.

2. Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries.
3. Upon proof (by his customers) that he usually kept correct books.
4. Upon inspection by the court, to see if the books are free from any suspicion of fraud.

* * *

38-409 (5782; 1029 P. C.) Effect of acquiescence or silence

Acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission.

* * *

38-411 (1032 P. C.) Confessions must be voluntary

To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury.

* * *

38-414 (1035 P. C.) Confession by joint offender or conspirator

The confession of one joint offender or conspirator, made after the enterprise is ended, shall be admissible only against himself.

* * *

38-418 (5785) Confidential communications, etc.

(a) There are certain admissions and communications excluded from consideration of public policy. Among these are:

1. Communications between husband and wife.
2. Between attorney and client.
3. Among grand jurors.
4. Secrets of state.
5. Psychiatrist and patient.

(b) No physician licensed under Code Chapter 84-9 shall be required to release any medical information concerning a patient, or in the case of a minor, by his or her parents or duly appointed guardian ad litem, except on written authorization or other waiver by the patient or on appropriate court order or subpoena: Provided, however, that any physician releasing information under written authorization or other waiver by the patient or under court order or subpoena shall not be liable to the patient or any other person: Provided, further, that the privilege shall be waived to the extent that the patient

places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding: and Provided, further, that this subsection shall not apply to psychiatrists.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appendix to the Petition for Writ of Certiorari was sent by ordinary mail to Mr. Michael J. Bowers, Attorney General, Judicial Building, Room 132, Atlanta, Georgia 30334, and Mr. Stephen A. Williams, District Attorney, Conasauga Judicial Circuit, Whitfield County Courthouse, Dalton, Georgia, 30720, Counsel for the Respondent, on this _____ day of October, 1982.

Margery Malkin Koosed

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Counsel for Petitioner
Janice Buttrum

Office - Supreme Court, U.S.
FILED
NOV 18 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JANICE BUTTRUM,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF IN OPPOSITION FOR THE RESPONDENT

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## QUESTION PRESENTED

1.

Whether the trial court properly allowed an expert witness to testify for the state during the sentencing phase of Petitioner's trial as to his opinion of the Petitioner's mental condition and future dangerousness?

## TABLE OF AUTHORITIES


| Cases cited | Page(s) |
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| Buttrum v. State, 249 Ga. 652 (1982) . . . . . | 1 |
| Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981) . . . . . | 7, 10 |
| Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) . . . . . | 8 |
| Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) . . . . . | 7, 8, 12 |
| Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) . . . . . | 9, 11, 12 |
| United States ex rel. Smith v. Baldy, 344 U.S. 561, 97 L.Ed.2d 549, 73 S.Ct. 391 (1953) . . . . . | 14 |

| Statutes cited | |
|---|---|
| Fed. R. Evi. 703 . . . . . | 13 |
| O.C.G.A. § 15-10-30(b) (Michie 1982); Ga. Code Ann. § 27-2534.1(b) (Harrison 1977) . . . . . | 12 |
| O.C.G.A. § 17-10-2(c) (Michie 1982); Ga. Code Ann. § 2503(b) (Harrison 1977) . . . . . | 8 |
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NO. 82-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JANICE BUTTRUM,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

## PART ONE

## STATEMENT OF THE CASE

Petitioner, Janice Buttrum, was indicted in Whitfield County, Georgia, during the July Term, 1980, for the murder of Demetra Faye Parker and the theft of her motor vehicle. Petitioner was tried by a jury and found guilty of both offenses. Petitioner was sentenced to death for the murder upon a finding of O.C.G.A. § 17-10-30(b)(2) and (7) (Michie 1982); Ga. Code Ann. § 27-2534.1(b)(2) and (7) (Harrison 1977).

On direct appeal to the Supreme Court of Georgia, Petitioner's convictions and sentences were affirmed. Buttrum v. State, 249 Ga. 652 (1982). The instant petition for a writ of certiorari was then filed by the Respondent.

## PART TWO

## STATEMENT OF FACTS

The jury was authorized to find that nineteen year old Demetra Faye Parker was savagely raped, sodomized and stabbed ninety-seven times in her motel room at the Country Boy Inn, in Whitfield County, Georgia, during the early morning hours of September 3, 1980. Demetra Parker had lived in Tennessee, but had come to Georgia to be near her boyfriend. On the evening before her death, September 2nd, Ms. Parker arranged to meet two friends. (T. 512, 1519). Ms. Parker and her companions spent approximately two hours together at Demetra's motel room watching television. During this visit, Appellant's husband, Danny Buttrum, was observed pacing back and forth approximately fifteen to twenty times outside Demetra's room. (T. 1513, 1516, 1520). Demetra told her friends that she was fearful of Mr. Buttrum and they locked the door. At approximately 8:30 p.m. Ms. Parker drove her guests home. (T. 1513-1514, 1520).

Christopher Busby lived at the Country Boy Inn during August and September of 1980. Appellant and her husband also had a room, Room No. 243, at the same motel. (T. 1539, 1540, 1549, 1624). Mr. Busby and Mr. Buttrum visited with each other during Tuesday, September 2, and drank a beer together. During this time, Ms. Parker drove Appellant to the store and to the laundromat. (T. 1417, 2046, 2059).

At approximately 7:00 to 7:30 p.m., Mr. Buttrum, Appellant and their baby, along with Mr. Busby, left the motel to purchase beer. (T. 1514, 1552). The three adults and the child drove around in Mr. Busby's blue and white Ford Torino and tried to "get him a girl" at Danny Buttrum's request. (T. 1539, 1544). When questioned if Appellant would become angry, Mr. Buttrum stated, "No, as long as she gets to go with her first." (T. 1395, 1544).

Female witnesses testified that Mr. Buttrum came to visit them during the late evening hours of September 2, 1980 and that they observed a woman seated in the back of the car. Danny Buttrum was unable to make arrangements with any of the women and returned to the motel with Appellant, their child and Mr. Busby. (T. 1546, 1570-1572, 1578, 1598). Mr. Busby then loaned Mr. Buttrum his car, which was returned at approximately 3:45 a.m. on September 3, 1980. (T. 1546, 1547).

During the early morning hours of September 3, Appellant and her husband went to Demetra's room, No. 253, at the Country Boy Inn in Dalton, Georgia. (T. 1394, 1435, 1624-1625). Appellant, while holding her baby, knocked on Demetra's door and when Ms. Parker answered, the couple rushed inside. While Mr. Buttrum struggled with Demetra, Appellant adjusted the lights and closed the door. (T. 1394, 2049, 2090).

Appellant began to stab Demetra with a Barlow brown and white knife after Mr. Buttrum wrestled the victim to the ground. (T. 1436, 2092, 2106). Appellant repeatedly stabbed Ms. Parker, whereupon, Appellant's husband took the knife and continued the attack. (T. 1394, 1436, 2104). Mr. Buttrum and Appellant took turns stabbing their victim, (T. 1394) and while Appellant was stabbing Demetra, her husband was masturbating. (T. 1436). When Ms. Parker refused to die, Appellant cut her across the stomach to kill her, "because it was the only place to cut," and "that girl sure didn't want to die." (T. 1394, 1436). As a final sadistic touch, Appellant's husband picked up a cylindrical toothbrush holder and pushed it into Demetra's vagina. (T. 2052). Only then did Appellant and Mr. Buttrum pick up their child from the motel room floor, along with Demetra's ring and pocketbook and finally leave the room. (T. 1436). Appellant and her family returned to their motel room to wash off Demetra's blood and they then fled in Ms. Parker's 1975 Buick Riviera. (T. 1436, 2100).

Dr. James Metcalfe, Associate Pathologist at Hamilton Memorial Hospital, performed the autopsy on Demetra Parker. (T. 1380, 1451-1453). Demetra was 5' 8 1/2" and weighed approximately 100 lbs. She incurred sixty-seven stab wounds to her left chest with a maximum depth of 2". The blade penetrated several ribs and her left lung. Dr. Metcalfe observed twenty-four stab wounds and cuts in the front neck area with several cuts to the windpipe. (T. 1451-1456). Spinal stab wounds were 2" deep and cut into the back bone. A gapping gash had been inflicted to Demetra's lower abdomen exposing her bowels. (T. 1456). Demetra suffered a 4" cut in the genital area, as well as damage to the vagina and rectum from forcible penetration. (T. 1456, 1459, 1473). Hemorrhages and bruise marks were observed on Demetra's scalp, nose, knees and genital region. (T. 1457). Finally, there was a 1" to 1 1/2" bite mark on her neck. (T. 1457, 1467).

Dr. Metcalfe stated that the vast majority of injuries around the vagina and anus occurred while Demetra was alive. (T. 1468). Demetra died only after the attack or at the very end of the prolonged assault. (T. 1469). The stab wounds to the chest and neck finally resulted in her death. (T. 1467-1468).

Special Agent Charles Johnson of the GBI investigated the murder. (T. 1373-1374). He found bloody towels, panties and other items in Demetra's room. (T. 1375). Mr. Chambracant Patel, the manager and owner of the Country Boy Inn, informed investigators that he had discovered Demetra's body. (T. 1610). Mr. Patel also found the key to Appellant's room on the motel front desk and after investigating, determined that Appellant had abandoned her room. (T. 1609, 1612). Mr. Patel admitted investigators to Appellant's empty room. (T. 1377). A bar of soap and a pink washcloth both covered with blood were found in the sink of Appellant's room. (T. 1377-1378).

Forensic Serologist Connie Pickens examined the evidence and a blood sample from Demetra Parker. (T. 1476-1479). Demetra had Type O blood, which was the same type of blood as the blood stains found on the physical items of evidence including the pink washcloth in Appellant's abandoned room. (T. 1479-1480, 1485). Forensic Serologist John Wiegel, Jr. found the blood enzymes on the pink washcloth to be consistent with Demetra's blood enzyme makeup. (T. 1493-1502).

At approximately 5:00 a.m. on September 3, Appellant, her husband and child drove to the truckstop where Mr. Buttrum worked. (T. 1592). Appellant attempted to borrow money but was unsuccessful. (T. 1592). Appellant was finally able to get $20.00 from the truckstop manager. (T. 1598-1603). Appellant stated, "I don't know if you know what's going on or not, but we're in a hurry. And if Mr. Teems or anyone ask you, you have not seen us." (T. 1602-1603).

Special Agent Willard Dodd of the GBI contacted Appellant's mother-in-law on Wednesday, September 3. Mrs. Buttrum had given the couple money at approximately 6:00 a.m. that morning. (T. 1421-1423). Appellant contacted Mrs. Buttrum by telephone the following morning from Pensacola, Florida, requesting that more money be wired to the local Western Union Office in Florida. (T. 1425). Appellant and her husband were arrested on September 4th in Pensacola as they attempted to pick up the money that had been wired to them. (T. 1428-1431). Appellant gave the ring and barrette that she had taken from the victim to Agent McPaul. (T. 1436-1437, 1442). Appellant stated, "Should you feel some remorse when you kill somebody?" because she didn't feel anything. (T. 1417). Appellant was advised of the Miranda warning and signed a waiver form. (T. 1434-1436, 1616-1621, 1624-1625). Appellant thereafter read and signed her confession. (T. 1622-1623, 1625).

Whitfield County Sheriff's Department jailer John Parker received a letter written by Appellant while she was incarcerated requesting that the communication be given to the proper authority. (T. 1632-1646). Appellant wrote that she killed Demetra Parker as an unwarranted act of jealousy and that she made her husband do everything he did, including the rape of Demetra Parker. (T. 1644).

Appellant did not testify during the guilt/innocence phase of her trial. The jury found Appellant guilty of murder and theft of a motor vehicle. (T. 1770). The defense attempted to establish Appellant's impoverished childhood background, replete with neglect, victimization by her stepmother, and non-existent home hygiene during the sentencing phase of the trial. (T. 1937-1941, 1949-1952, 1960-1967, 1968-1973, 1973-1982). Appellant was characterized as being non-violent, passive, withdrawn and having a low self image. (T. 1979, 2005, 2017). Witnesses testified, however, that the observations attested to were based on familiarity with Appellant during 1977 and from Appellant's early elementary school years. (T. 1950-1951, 1961, 1968, 1982, 2000). Furthermore, one witness stated that not many neglected children commit murder and that many children in similar situations lead good lives. (T. 1942, 1947). When questioned about Appellant's capacity to commit such a crime, Unit Director of the Bartow County Juvenile Court, Wanda Holstein, stated, "I would have to do more of a study of what's happened in Janice's life since I worked with her." (T. 1997). Appellant was characterized as an individual who "would make decisions that would give her the most pleasure, without really giving any consideration to the consequences." (T. 2008).

Appellant testified during the sentencing phase of her trial that her husband would do anything when he had been drinking. (T. 2041). Appellant admitted stabbing the victim because she was hurt and angry. (T. 2051). Appellant denied

having oral sex with the victim and also testified that the letter she had written while in jail was not true. (T. 2055, 2088). Appellant alleged that she did not remember making the statement she had made to the authorities. (T. 2098).

Clincial Psychologist Henry Adams testified at trial that Appellant has an anti-social personality as well as symptoms of paraphilia sexual sadism. (T. 1804, 1822, 1835). This type of individual becomes excited by the suffering, humiliation and pain of the victim, especially from a non-consenting individual. (T. 1814-1816). Dr. Adams further testified that the behavior was a repetitive type of activity that continues until the person is apprehended or stopped in some way. (T. 1822-1823).

## PART THREE

## REASON FOR NOT GRANTING THE WRIT

### I. THE TRIAL COURT PROPERLY ALLOWED AN EXPERT WITNESS TO TESTIFY FOR THE STATE DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL CONCERNING HIS OPINION OF THE PETITIONER'S MENTAL CONDITION AND FUTURE DANGEROUSNESS.

Petitioner contends that the Eighth and Fourteenth Amendments bar the admission of expert witness testimony regarding the likelihood of a defendant's commission of future acts of violence. To support her argument that such expert testimony is inherently unreliable, Petitioner cites extensively the amicus curiae brief submitted by the American Psychiatric Association in Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981).

Under the Georgia statutory scheme, which this Court held to be constitutional in Gregg v. Georgia, 428 U.S. 153, 49

L.Ed.2d 859, 96 S.Ct. 2909 (1976), the procedure for allowing testimony during the sentencing phase of a capital trial is set forth as follows:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law . . .

O.C.G.A. § 17-10-30(b) (Michie 1982), Ga. Code Ann. § 27-2534.1(b) (Harrison 1977).

Considering this portion of the Georgia statute, this Court, in Gregg v. Georgia, Id., approved the Georgia procedure which allows the use of non-statutory aggravating or mitigating circumstances during the sentencing phase of the bifurcated trial, even though those circumstances are not delineated in the statute. Id. at 164. This Court held that the Georgia death penalty statute, which authorizes the jury to consider appropriate non-statutory aggravating circumstances during the sentencing phase, is constitutional. In discussing this issue, this Court noted that the Georgia statute allows the jury to consider the circumstances of the crime and focuses the jury's attention on the characteristics of the person who committed the crime. Id. at 197. Thus, this Court held that the Georgia sentencing procedures were constitutional and did not possess any of the defects previously outlined by the Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

In the instant case, pursuant to O.C.G.A. § 17-10-2(c) (Michie 1982), Ga. Code Ann. § 27-2503(b) (Harrison 1977), the state, after proper notice to the Petitioner introduced the expert testimony of Dr. Henry Adams, a clinical psychologist who chaired the Division of Social and Behavioral Science at

the University of Georgia. (T. 1804). Dr. Adams testified that after reviewing FBI reports, the Petitioner's confessions,reports from Central State Hospital, the autopsy report, and photographs of the victim, he compiled a professional study of the Petitioner. (T. 1817-1818). Dr. Adams testified that the report he reviewed from Central State Hospital included a social history of the Petitioner, a psychiatric report, a psychological evaluation, and ward notes. (T. 1818). Based upon Dr. Adams' study and upon his expertise in this field, Dr. Adams testified that it was his opinion that the Petitioner possessed an anti-social personality as well as exhibiting paraphilia sexual sadism. (T. 1822). Dr. Adams also testified that based upon his investigation of Petitioner and his expertise in this area, it was his opinion that individuals who exhibited this form of behavior were likely to repeat their acts. (T. 1823).

Dr. Adams was subjected to a thorough and sifting cross-examination by Petitioner's defense counsel. On cross-examination, Dr. Adams testified that he was aware that other experts who had evaluated Petitioner reached a conclusion of no medical diagnosis of a mental disease. (T. 1826-1828). Also on cross-examination, Dr. Adams testified that he had not personally examined the Petitioner, but that it was fairly common for a diagnosis to be made based upon information other than a personal examination. (T. 1824). Dr. Adams did testify that he would "feel much more comfortable" about the accuracy of his opinion had he actually examined the Petitioner. (T. 1825).

Petitioner alleges that such expert testimony relating to the future dangerousness of a capital defendant is inherently unreliable and should never be admitted in the sentencing portion of capital cases. However, contrary to Petitioner's argument, this Court, in Jurek v. Texas, 428 U.S. 262, 49

L.Ed.2d 929, 96 S.Ct. 2950 (1976), held that the imposition of a death sentence under the Texas death statute was constitutional. The Texas capital sentencing procedure requires the jury, during the sentencing phase of the trial, to answer three questions before a sentence of death can be imposed. One of these questions forces the jury to determine whether it is probable that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Id. at 268.

In Estelle v. Smith, supra, this Court again considered whether expert testimony about a capital defendant's future dangerousness was properly admissible at the sentencing portion of a capital trial. In Smith, this Court held that it was improper to admit testimony of a psychiatrist during the penalty phase of a capital murder trial where the defendant was not advised before the pretrial examination that he had a right to remain silent and that any statement he made could be used against him, and where defense counsel were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness. Id. at 468-469. In reaching this conclusion, however, this Court did not accept the argument advanced by the American Psychiatric Association in its amicus curaie brief, and relied upon by Petitioner in the instant case, that testimony of a capital defendant's likelihood to commit future criminal acts was inherently unreliable. Rather, this Court explicitly stated that, "Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute" Id. at 472. The Court noted that:

> Prediction of future criminal conduct is an essential element in many of the

> decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those senteced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice.

Id. at 473, quoting Jurek v. Texas, supra at 275-276.

Respondent submits that contrary to Petitioner's argument, expert testimony relating to a defendant's future dangerousness does not violate the defendant's constitutional rights. Rather, this Court explicitly approved such testimony in determining that the Texas death penalty statute, which on its face requires such a showing, is constitutional. Also, in holding that the Georgia death penalty scheme is constitutional, this Court has approved a procedure whereby the state is allowed to introduce non-statutory aggravating evidence during the penalty phase of the bifurcated trial. Respondent notes that under the Georgia death penalty statute, the defendant is given an opportunity to present any mitigating

circumstances during the penalty phase of the trial. O.C.G.A. § 15-10-30(b) (Michie 1982), Ga. Code Ann. § 27-2534.1(b) (Harrison 1977). In the instant case, following Dr. Adams' expert testimony, the Petitioner presented lengthy mitigating evidence which brought to the jury's attention her youth and her deprived social background.

Respondent submits that under the Georgia statutory scheme for the imposition of the death penalty, expert testimony relating to a defendant's future dangerousness is properly admitted as non-statutory aggravating circumstances. Such testimony can, and was in the instant case, be rebutted by mitigating testimony presented by the defendant. Petitioner has shown no reason to require this Court to reverse its previous holdings in Gregg v. Georgia, supra and Jurek v. Texas, supra, which sanctioned such testimony.

Petitioner next moves from the general argument that expert testimony relating to future dangerousness is always inadmissible to a specific argument that such testimony was inadmissible at her trial. Specifically, Petitioner alleges that Dr. Adams' testimony was improperly admitted because he had never personally examined or interviewed her and because his testimony allegedly was based upon hearsay and materials not in evidence. Petitioner also alleges that the trial court improperly refused the Petitioner's request for an independent psychiatric examination at state expense.

These issues were addressed by the Supreme Court of Georgia on the direct appeal of Petitioner's conviction. In its opinion, the Georgia Supreme Court held:

> It has long been the rule in this state that an expert witness may give his opinion as long as he states the facts on which he bases his conclusion. The fact that an expert's opinion may be based in part on facts not in evidence goes to the

> weight and credibility, not to its admissibility. Redfield v. State, 240 Ga. 460 (1) (241 S.E.2d 217) (1978) and cases cited. There is no merit to this enumeration of error.

Buttrum v. State, supra at 655.

Although the Petitioner claims that Dr. Adams based his conclusions upon items which were not in evidence before the jury, this contention asserts form over substance. Testimony as to the substance of Appellant's confessions had been placed before the jury during the guilt/innocence phase of her trial, along with the testimony of FBI agents as to the arrest and interrogation of Appellant, photographs of the victim, and testimony as to the findings of the medical examiner. Thus, the great majority of evidence upon which Dr. Adams based his opinion had previously been admitted into evidence and considered by the jury.

Respondent additionally notes that Dr. Adams' testimony would be admissible not only under the principles of Georgia law, but also under the Federal Rules of Evidence. Fed. R. Evi. 703 specifically states that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing if of a type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Thus, Respondent submits that Dr. Adams' testimony was properly admitted under both state and federal rules of

evidence, and that Petitioner's constitutional rights were not violated by the admission of this testimony.

Petitioner's allegation that the trial court improperly allowed Dr. Adams to testify at her sentencing trial without also providing her with additional funds to employ an independent expert in the preparation of her defense was also found to be without merit by the Supreme Court of Georgia on direct appeal. Appellant alleges that an independent psychiatric expert was necessary for a fair and adequate opportunity to defend herself against Dr. Adams' testimony. However, Respondent notes that prior to Appellant's trial on the issue of her competency, the trial court had ordered the Appellant to be examined. Appellant was given extensive testing and examination by staff members from two hospitals. At its hearing on Appellant's motion for appointment of an independent psychiatrist to participate in the defense, which was held after Petitioner was given notice of Dr. Adams' testimony, the trial court noted that Petitioner had already been examined by a psychatrist whose opinion differed from Dr. Adams' opinion. The doctors who had previously examined Petitioner were available for subpoena to refute Dr. Adams' opinion. In United States ex rel. Smith v. Baldy, 344 U.S. 561, 97 L.Ed.2d. 549, 73 S.Ct. 391 (1953), this Court held that, contrary to Petitioner's assertion, a criminal defendant is not entitled to an endless search for a favorable psychiatric diagnosis at public expense when substantial and competent evidence already has been obtained. Id. at 568.

Respondent submits that contrary to Petitioner's allegation, the trial court properly allowed expert testimony during the sentencing phase of Petitioner's trial relating to Petitioner's future dangerousness. Dr. Adams was subjected to a thorough cross-examination by Petitioner's counsel, and in rebuttal of his testimony, Petitioner was given access to other state officials who had examined Petitioner and whose opinion

varied from Dr. Adams' opinion. Also, in rebuttal of Dr. Adams' testimony, the Petitioner presented lengthy evidence in mitigation.

Respondent submits that expert testimony concerning the future dangerousness of a criminal defendant is properly admissible in the sentencing phase of a capital trial, and that there were no factors in Petitioner's trial which rendered such testimony inadmissible.

## CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Hill, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

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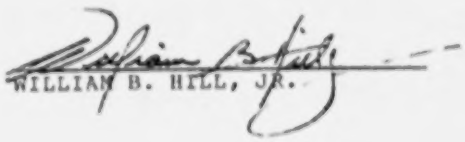
This 10th day of November, 1982.



WILLIAM B. HILL, JR.

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CLERK

DEC 3 PAGE 7

No. 82-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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JANICE BUTTRUM,

Petitioner,

-vs-

STATE OF GEORGIA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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# PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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## SUPPLEMENTAL QUESTION PRESENTED

DOES INTRODUCTION OF EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AND CONSIDERATION OF SUCH EVIDENCE IN IMPOSING THE DEATH PENALTY OFFEND THE EIGHTH AND FOURTEENTH AMENDMENTS?

## ARGUMENT

In its Brief in Opposition, the Respondent, State of Georgia, submits that expert testimony as to future dangerousness is properly admissible in Georgia sentencing proceedings as a non-statutory aggravating circumstance. (Brief in Opposition, pages 8 to 12.)

Although the Petitioner's Questions Presented did not explicitly raise the issue of whether Georgia's practice of permitting expert witness testimony as to future dangerousness denied her rights under the Eighth and Fourteenth Amendments because it was evidence of a non-statutory aggravating circumstance, the State of Georgia has argued the issue, and Petitioner would contend it is "a subsidiary question fairly included" in the Questions Presented. Rule 21.2(a) of Rules of Supreme Court. Petitioner would thus respectfully ask this Court to consider as part of the First Question Presented this subsidiary supplemental question: Does the Introduction of Evidence of a Non-Statutory Aggravating Circumstance and Consideration of Such Evidence in Imposing the Death Penalty Offend the Eighth and Fourteenth Amendments?[1/]

Respondent's contention that evidence as to statutory aggravating circumstances may be introduced and relied upon by the sentencer has been soundly rejected by two Circuit Courts, and contrary to Respondent's assertion, this Court has not held that this practice is constitutional.

Decisions of the Fifth and Eleventh Circuits demonstrate that reliance upon non-statutory aggravating circumstances

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[1/] Petitioner has adequately preserved this issue, as Respondent's argument would indicate. The trial counsel repeatedly objected to Dr. Adams' testimony as "irrelevant in a sentencing/aggravation phase." (A-24, A-27 to A-28, A-29, A-30 to A-31.) The trial court overruled the "objection to the whole of the witness's testimony as being irrelevant." (A-32.)

is a violation of the Eighth and Fourteenth Amendments as it increases the risk that the death penalty is imposed in an arbitrary and capricious manner. *Henry v. Wainwright*, 661 F. 2d 56 (5th Cir., 1981), vacated on other grounds, ___ U.S. ___, 102 S. Ct. 2922, 73 L.Ed. 2d ___ (1982), *aff'd.*, 686 F. 2d 311 (1982). *Proffitt v. Wainwright*, 685 F. 2d 1227 (11th Cir., 1982) is particularly pertinent to the case at bar, as there the Eleventh Circuit concluded that admission of evidence of "a propensity to commit the crime for which (Proffitt) was convicted" was a denial of the Eighth and Fourteenth Amendments as such evidence bore "no resemblance to any of the statutory aggravating factors." *Id.*, at 1266.

The Brief in Opposition contends that this Court's awareness in *Gregg v. Georgia*, 428 U.S. 151 (1976) of the ability under Georgia's sentencing statutes to admit non-statutory aggravating evidence forecloses any argument on this issue at this time. However, as this Court stated in *Zant v. Stephens*, ___ U.S. ___, 102 S. Ct. 1855, 1857 (1982):

> "Our review [in *Gregg*] of the statute did not lead us to examine all of its nuances. It was only after the state law relating to capital sentencing was clarified in concrete cases that we confronted and addressed more specific constitutional challenges in *Coker v. Georgia*, 433 U.S. 584 (1977) . . . ; *Presnell v. Georgia*, 439 U.S. 14 (1978) . . . ; *Green v. Georgia*, 442 U.S. 95 (1979) . . . ; and *Godfrey v. Georgia*, 446 U.S. 420 . . . (1980).

Furthermore, Justices Marshall, Brennan, and Powell have expressed views in *Zant v. Stephens*, *supra* at 1858-1865, inconsistent with this argument of the State of Georgia.

This issue clearly is not foreclosed, and it is Petitioner's understanding that the Court has just granted review to *Barclay v. Florida*, #81-6908, ruling below, 343 So. 2d 1286 (Fla. 1977), *cert. granted*, November __, 1982, which raises at least similar issues.

Resolution by this Court of *Barclay* and *Zant v. Stephens* will assist in determining Petitioner's issue, but not necessarily be dispositive. The Respondent herein makes the same contention which the Georgia Supreme Court may have presented in its answer to the certified question in *Zant v. Stephens*, No. 38763 (decided Oct. 27, 1982), that non-statutory aggravating circumstances are generally admissible. As earlier stated, Petitioner contends this conclusion is totally inconsistent with this Court's requirement of clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a death sentence. *Godfrey v. Georgia*, 446 U.S. 420 (1980). How can "measured, consistent application" *Eddings v. Oklahoma*, ___ U.S. ___, 102 S. Ct. 869, 879 (1982) of the death penalty be achieved if the aggravating circumstances considered may vary from one capital sentencing hearing to another? If there were some control from a state statute, or at the least, judicial decision, perhaps discretion would be adequately guided. This is where Petitioner's case varies from that of *Zant v. Stephens*.

The Georgia Supreme Court answer in *Zant v. Stephens* may be narrowly read as relying on the fact that evidence of prior convictions is specifically enumerated in § 27-2503 as admissible in the sentencing hearing. The Georgia Court states:

> ". . . [E]vidence of Stephens' prior record was admissible aside from any relevance it had to the invalid gound of (b)(1), Code Ann. 27-2503 . . . . A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." *Zant v. Stephens*, No. 38763, at p. 6-7 (Oct. 27, 1982).

If the Georgia Supreme Court decision is read in this limited fashion, the State may argue that perhaps sufficiently

consistent guidance can be expected to be achieved to permit Stephens' death sentence to be upheld. In Petitioner's case, however, the expert prediction of future dangerousness evidence argued by Respondent to be admissible as a non-statutory aggravating circumstance is not identified as generally admissible in § 27-2503. Thus, no guidance to sentencing bodies has been provided through the statutory mechanism.[2/]

Alternatively, if the Georgia Supreme Court had specifically approved a defendant's future dangerousness as an appropriate aggravating factor, the State could possibly argue that through this mechanism, the requisite guidance may be achieved. But the Georgia Supreme Court's review of death sentences does not generally appear to be creating any "list" of permissible non-statutory aggravating circumstances. Further, the Georgia Court is not conveying such information to juries, so that they are "given guidance regarding the factors about the crime and the defendant that the State . . . deems particularly relevant to the sentencing decision." *Gregg*, at 192. This, at the very least, is essential if reasonably consistent application by juries is to be approached.

This is another point of distinction between *Stephens* and the Petitioner's case. The Georgia Supreme Court has announced that prior convictions may be considered in aggravation. *Gates v. State*, 244 Ga. 587, 261 S.E. 2d 349 (1979). Petitioner can find no such explicit ruling regarding future dangerousness.

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[2/] Further, Petitioner would argue that the Georgia Supreme Court's purported "different" case where the evidence may "otherwise" be "inadmissible" is actually the Petitioner's. Petitioner has argued throughout that the expert witness prediction testimony herein should not be admissible, as it is too unreliable and of questionable relevancy to the sentencing decision. *Petition*, at 6-9.

## CONCLUSION

This Court has granted review in *Barclay* apparently to reach the issue of Florida's practice of considering non-statutory aggravating circumstances. While *Zant v. Stephens* may address this issue for Georgia, it is possible that as prior convictions are set forth as properly admissible evidence in § 27-2503, this Court's treatment of the issue may be affected.

The Attorney General has conceded that future dangerousness is a non-statutory aggravating circumstance, and Petitioner contends no additional guidance is provided the sentencer by Georgia capital sentencing statutes or by judicial decision. Petitioner requests that her Petition be granted to assure that Georgia capital defendants receive a full resolution of this significant constitutional issue.

Petitioner further contends that the Questions Presented in her original Petition are substantial constitutional questions deserving of this Court's review. Petitioner believes her Argument in support of the Petition adequately refutes the Respondent's claims of compliance with the Fourteenth and Eighth Amendments.

For all the reasons stated, the Petitioner prays that the writ of certiorari be issued.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Margery Malkin Koosed, a member of the Bar of the Supreme Court of the United States and counsel of record for the Petitioner, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Reply and Supplemental Brief for the Petitioner by depositing it in the United States mail, with proper address and adequate postage to:

William B. Hill, Jr.
Senior Assistant Attorney General
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

this 19th day of November, 1982.

Margery Malkin Koosed
MARGERY MALKIN KOOSED
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Janice Buttrum